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ABSTRACT

The Office of the Commonwealth of Puerto Rico and the Center for Applied Linguistics cooperated in a state-of-the-art study of the field of bilingual education. State-of-the-art papers were commisioned in four general areas concerning bilingual education: social science, languages and linguistics, law, and education. Each paper formed the central focus for a spearate conference at which it was discussed and elaborated upon by specialists from various fields within a given discipline. This volume is the third in a series of five volumes. The focus of the volume is the law. One major paper is presented, "The Legal Perspective," by Herbert Teitelbaum and Richard J. Hiller. This paper provides a historical perspective of legal issues related to bilingual education. The case of Lau v. Nichols, involving Chinese public school students and the San Francisco Unified School District, is described, as well as a number of similar cases. Common defenses offered by school boards for their failure to provide bilingual education are discussed, as well as bilingual education, and desegregation, and bilingualism in areas other than education. An article by A. John Wabaunsee, "Native American Viewpoint," concludes the volume. It deals with the problems encountered by Native Americans with bilingual education. (CLK)

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BILINGUAL EDUCATION: CURRENT PERSPECTIVES

Law

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VOLUME 3

BILINGUAL EDUCATION: CURRENT PERSPECTIVES

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Preface

The Center for Applied Linguistics, which serves as a national center for policy, research, and information in language and linguistics in the United States, is pleased to make this survey of *Bilingual Education: Current Perspectives* available to decision-makers and others interested in this important and rapidly-developing field. These volumes, and the conferences from which they came, reflect a concern on the part of the Center that significant decisions are constantly being made regarding bilingual education--by judges, lawyers, legislators, policy planners, administrators, teachers, parents--frequently in the absence of adequate information on which to intelligently base those decisions.

Believing that informed decisions are crucial in efforts to effectively meet the needs of non- and limited-English-speaking students, the Center brought together leading specialists in the United States concerned with bilingual education from a number of disciplines, to provide the most complete compilation of information possible on this subject. The results reflect the complexity of the situation, as well as the relative paucity of research data resulting from an almost total lack of federal funding for research. It is a national scandal that the United States has spent over half a billion dollars on bilingual programs, and less than one-tenth of one percent of this amount on the basic research needed to improve the quality of programs. If defense systems and medical drugs were developed in the same way, we would certainly fear for our national safety and health. But in education, programs continue to be planned, and legislation implemented, with little thought for research. It is ironic that although Canada has probably spent one-tenth as much money on bilingual programs as the United States, most of the research available on bilingual education has and continues to come from Canada. This is a situation which policy-makers urgently need to remedy, if efforts to insure equal education opportunity for limited-English-speaking students are to proceed with any confidence.

The Center for Applied Linguistics has been active since its inception in 1959 in the fields of teaching English to non-English speakers and the teaching of foreign languages, and in recent years has given priority to work in bilingual education in an effort to improve the quality and effectiveness of this approach to language instruction. Currently, the Center, in effect, serves as a national resource center in the field of bilingual education. Through its work in this field and its other research and service projects dealing with language and education, the Center has developed considerable capabilities for assisting schools and communities to meet the needs of multilingual populations.

The Center is grateful to the Carnegie Corporation of New York for providing financial support to this project, and to the Office of the Commonwealth of Puerto Rico in Washington, D.C. for their encouragement and funding of the development of a grant proposal.

I want to thank Leann Parker, who served as coordinator for the series of conferences, and helped see these publications through the press. She did an excelient job of a very complex task, and deserves our gratitude.

Rudolph C. Troike, Director
June 1977

Foreword

The nature of language and its relationship to culture is such that it is unfeasible to attempt to change one and not the other. Attempts have been made to teach English as a second language, as in the case of Puerto Rico, allowing the Puerto Rican society to maintain its native Spanish language and culture. In the case of Puerto Rico, the learning of English has become a necessity brought about by its close political and economic ties to the United States. In the past, the emphasis in the school system was placed on the study of English in order to Americanize the island.

Traditionally, the teaching of English as a second language in the United States has been geared toward the complete acculturation of foreign and ethnic groups to the mainstream of American society, without allowing these ethnic groups to use their mother tongue for any other purpose than social communication in their communities. However, the Puerto Ricans have determined that it is their right to keep Spanish as their first language and learn English as a second. In Puerto Rico, Spanish as the native tongue has been maintained for use not only in social settings but in overall economic and political communications, with English used as the language of technology.

The knowledge of more than one language has become a necessity in the world we live in today. Our close ties to each and every other member of the world has also made it necessary to understand the different cultures which comprise our society, without imposing any one language or culture on any member of that society.

This concern about the nature of language and culture and related education policies, both in the United States and Puerto Rico, led the Office of the Commonwealth of Puerto Rico (OCPRW) to inquire more about what is actually happening in the field of bilingual education in terms of research and practices. As the Center for Applied Linguistics shared many of these same concerns, the OCPRW decided to support a proposal by CAL to develop an in-depth, objective state of the art study of the field. We hope that the

papers presented in these volumes will bring a greater understanding of the issues and the state of our knowledge about various aspects of bilingual education and will provide a basis for sound decision-making in the future.

Office of the Commonwealth of Puerto Rico
in Washington, D.C.

June 1977

Introduction

One of the most noteworthy and controversial movements in American education over the past decade has been bilingual education. The concept of providing instruction in their own language to students who come to school speaking little or no English was given federal sanction in the 1968 Bilingual Education Act (Title VII, Elementary and Secondary Education Act). Since that time, bilingual education programs serving numerous language groups have multiplied across the country as federal, state and local funds have been allocated to this purpose. Momentum was increased by the landmark *Lau v. Nichols* decision in January 1974. The Supreme Court found that providing identical education programs for both English- and non-English-speaking students did not constitute equal education opportunity and that special language instruction was necessary to allow non-English speakers real access to the content of the education services. Although not strictly mandated by the *Lau* decision, bilingual education has been seen by the Office of Civil Rights (DHEW) and subsequent court rulings as a major way of meeting the special needs of these students.

As public monies have been spent, and as linguistic and cultural minorities have vied for visibility and power, questions about bilingual education have abounded. The questioning of fundamental claims has recently been accentuated with the advent of Congressional hearings in preparation for rewriting the federal legislation in 1978.

It is in this context of controversy that the Center for Applied Linguistics, long a supporter of greater education opportunity for American minority groups, felt the need to take a hard and objective look at what is known about the undeniably complex nature of bilingual education. Many academic disciplines are researching relevant aspects of bilingualism, language acquisition and teaching in a bilingual situation from their own perspectives. People in other fields such as law, legislation and education administration are more involved in policy aspects of bilingual education. Each

group deals with the issues in its own way and each has much to contribute in terms of understanding the complex issues; yet, each needs access to sound information on which to base further research and analysis of the field and for decision-making.

Recognizing the need for an objective, multidisciplinary and comprehensive look at the field of bilingual education, CAL sought support for a project which could produce such a state of the art survey. Sharing the Center's concern, the Office of the Commonwealth of Puerto Rico in Washington (OCPRW), under the directorship of Jose Cabranes, provided support for the development of a grant proposal which was subsequently funded by the Carnegie Corporation of New York. The OCPRW has continued to assist the project through the participation and advice of Carmen Delgado Votaw.

CAL commissioned state of the art papers on four general areas of bilingual education: social science research, language and linguistic research, legal precedents and aspects and education perspectives and education research. Each paper formed the central focus for a separate conference at which it was discussed and elaborated on by specialists from different fields within that discipline. The conferences were attended by invited representatives of various federal agencies and other organizations, whose questions and comments brought useful direction to the discussions. During the spring of 1977, a final panel representing the several fields was convened. Participants at this session included authors of the major state of the art papers and specialists from a variety of fields. Their task was three-fold: To share information across disciplines; to synthesize what each could empirically say about various issues and questions in bilingual education; and to assist in the development of a guide to pertinent research findings for decision-makers.

This series of volumes presents the collection of major review papers and viewpoints of the discussants. Each of the first four volumes presents the particular perspective and research of a particular area. Following the meetings, the writers of the major papers were permitted the opportunity to revise their papers. Discussants' papers, although written in reaction to early drafts of the major papers, have been included for their insightful comments and frequently detailed reviews of the literature of specific areas of the various fields. The final or "synthesis" volume of this series has been designed to summarize and organize the findings in the various fields, and to direct the reader to relevant discussions in the papers presented in the other volumes.

CAL expresses its gratitude to the participants at each conference for their enthusiasm and contributions to increasing the understanding of bilingual education (see the acknowledgments for a list of conference participants). In particular, we thank the authors of the major review papers: Joshua A. Fishman, G. Richard Tucker, Herbert Teitelbaum and Richard Hiller, and George Blanco.

The project was also assisted by the able guidance of a steering committee and several advisors whom we would like to thank for their participation in this effort. Special thanks go to

Rudolph C. Troike and Roger W. Shuy, whose overview of the issues as well as their support and recommendations provided valuable direction throughout the project. Appreciation is also due to Shirley Brice Heath, whose insight and suggestions during the development of the synthesis volume were particularly helpful.

The Center also wishes to express its sincere appreciation to the Carnegie Corporation of New York for its generous and indulgent support of the project, and to project monitors Vivien Stewart and Frederick Mosher for their advice and assistance throughout the project.

Without the assistance and moral support of a number of competent persons working as a team it would not have been possible to plan and carry out the multitude of details and preparations essential to making the conferences run smoothly and to readying the papers for publication. Thanks also go to CAL's Bilingual Education and Indian Education Programs for their assistance throughout the project. We particularly thank the following staff for their participation in the synthesis meeting: Rosario C. Gingrás, Tracy C. Gray, Gilbert García, Lance Potter, and Phyllis Nudelman. We express our special appreciation to Cynthia H. Gusky for her expert secretarial assistance, to Diane Bartosh for her care in the copy-editing of the papers and in their final preparation for publication, and to Sonia Kundert for typing the first final manuscript.

L. Leann Parker, Project Coordinator
June 1977

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The Legal Perspective

Herbert Teitelbaum & Richard J. Hiller

School districts are increasingly obliged to provide bilingual-bicultural education programs to their limited English speaking students. This obligation may derive from federal or state legislation, community pressure or court order.

Introducing bilingual-bicultural education programs inevitably will produce changes in curriculum, personnel, standards of competency and a re-ordering of a school district's priorities. When such changes are advocated by minority groups, they often are perceived as politically motivated and institutionally threatening, and challenging deeply held and emotionally laden beliefs in cultural and language homogeneity. In these circumstances educational, political and social questions may merge.

Whether non-English speaking national origin minority group students receive an education free from unlawful discrimination when instructed in English--a language they could not understand--was the issue squarely presented to the courts in *Lau v. Nichols* (1). Though not expressly endorsing bilingual education, the *Lau* decision legitimized and gave impetus to the movement for equal educational opportunity for non-English speakers as only a unanimous Supreme Court ruling can. *Lau* produced additional federal legislation, energized federal enforcement efforts, led to the establishing of nine federal regional general assistance *Lau* centers, raised the consciousness of the need for bilingual education, aided the passage of state laws mandating bilingual education and spawned more lawsuits.

But, *Lau* left open as many questions as it settled. When do school districts offend the teachings of *Lau*? How many non-English students must there be, and must they be concentrated in few schools, before *Lau* applies? What is the severity and nature of language disability necessary to

trigger a student's entitlement to the benefits which *Lau* offers? Is a national origin minority group child who speaks and understands oral English but who reads below grade level, or otherwise underachieves, within the class of students covered by *Lau*? To what extent does the standard of liability applied to school districts offering an ineffective program answer the question of what types of programs are appropriate remedies? May school districts implement whatever programs they choose? Do Black students who are English illiterates qualify for *Lau* programs? Does *Lau* require school districts to adopt bicultural programs? How does the mandate of *Lau*, and bilingual programs in general, relate to the mandate of *Brown v. Board of Education* (2) which bars segregated schooling?

In several cases, lower federal courts grappled with some of these and other unanswered questions in the aftermath of *Lau*. The Department of Health, Education, and Welfare (HEW) also offered school districts some guidance by issuing the "*Lau* remedies" in the summer of 1975, but these provoked controversy and criticism. Adherents of bilingual education find the "*Lau* remedies" too limited in scope, the discretion afforded local officials too broad and HEW's enforcement efforts wholly inadequate. School authorities also are displeased, but for the contrary reasons, arguing that the "*Lau* remedies" are ambiguous, unduly burdensome and incapable of implementation.

As pressures mount from lawsuits and administrative proceedings to augment or implement bilingual programs, school officials seek to justify their inaction through strikingly similar defenses: Budgetary constraints, collective bargaining agreements, limited numbers of needy students and avoiding the segregation of minority students.

At the heart of the controversy over court-ordered bilingual programs is the effort to balance the Supreme Court's admonition that judges are not educators against the equally forceful mandate that unlawful discrimination must be swiftly and effectively remedied.

HISTORICAL PERSPECTIVE

There are few Supreme Court decisions which set the limits of a state's police power to restrict the use of a language other than English, and there are none which define a state's constitutional obligation, if any, to affirmatively accommodate the use of such languages.

What is clear from the few High Court cases on the subject of language is the overriding concern to preserve the sanctity of English as a key element of nationhood (3). Although the Court has outlawed certain restrictions on the use of foreign languages, it has generally couched its holding with dicta that border on jingoism. *Meyer v. Nebraska* (4)

and its companion cases, *Bartels v. Iowa* (5) and *Bohning v. Ohio* (6) are illustrative (7).

All three cases arose in the aftermath of World War I amidst lingering anti-German sentiments. As part of the effort to expunge any German influence in various communities, several states--including Nebraska, Iowa and Ohio--passed legislation forbidding teachers in both public and private schools from instructing children in a foreign language. Violators were subject to criminal sanctions.

Meyer v. Nebraska concerned a teacher convicted for giving German instruction in a private school. The Nebraska Supreme Court's affirmance of the conviction reflected the xenophobia of the era:

> The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners who had emigrated here, to be taught from early childhood the language of the country of their parents, was to rear them with that language as the mother tongue. It was to educate them so that they must always think in that language, and as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language, and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state. (8)

Finding that a teacher's right to teach and a parent's right to engage him are liberties protected by the due process clause of the Fourteenth Amendment, the Supreme Court overturned the conviction and declared the statute unconstitutional as applied. The tone of the Court's opinion, however, was almost apologetic, and its language reminiscent of the Nebraska Court below:

> The desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic

matters, is easy to appreciate. Unfortunate experiences during the late war, and aversion toward every characteristic of truculent adversaries, were certainly enough to quicken that aspiration.(9)

Meyer v. Nebraska and its related cases left significant and troublesome questions unresolved since they involved private schools. Would the holding have been the same for a public school? The Court hinted at the answer:

> The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has the challenge been made of the state's power to prescribe a curriculum for institutions which it supports.(10)

Yu Cong Eng v. Trinidad (11) is another case of state-imposed restrictions on the use of non-English languages. Significantly, the decision relates for the first time, albeit without discussion, language discrimination to national origin.

At issue in *Yu Cong Eng* was a Philippine criminal statute, "The Chinese Bookkeeping Act," outlawing the keeping of account books in any language other than English, Spanish or any local dialect. (The Philippines were under Spain's control until 1898, thus explaining the parity accorded English and Spanish in the "Chinese Bookkeeping Act.") Since the legislative history revealed that the prohibitions were aimed at Chinese merchants, the Supreme Court had no difficulty in finding that the statute constituted an arbitrary and oppressive deprivation of liberty and property without due process, as well as a violation of the Chinese merchants' rights to equal protection of the laws (12).

Whether a court accepts language as a characteristic of national origin will determine whether it regards differences in treatment based on language as inherently suspect and subject to strict constitutional review. Classifications made on the basis of national origin cannot satisfy the equal protection clause of the Fourteenth Amendment unless there is a compelling governmental interest (13), and not merely some rational basis (14). Courts have not been consistent in correlating language and national origin.

The legacies of *Meyer v. Nebraska* and *Yu Cong Eng* to those seeking to establish bilingual education in the public schools are limited. At best, they stand for the propositions that under certain circumstances states cannot prohibit the use of a foreign language, and that language can be construed as a characteristic of national origin. Both cases,

however, stress that the United States is an English speaking nation, and indicate that public bodies, such as schools and taxing authorities, can require the use of English.

Forty years after *Yu Cong Eng*, the Supreme Court again considered the constitutionality of discrimination based on language and national origin, this time in the context of voting rights. *Cardona v. Power* (15), concerning the use of literacy tests for Spanish-speaking Puerto Ricans in New York City, reached the Supreme Court after passage of section 4(e) of the Voting Rights Act of 1965 (16). That Act banned the use of literacy tests for persons educated in Puerto Rican schools through the sixth grade. Dissenting from the majority's determination that the case was moot, Justice Douglas, joined by Justice Fortas, declared that United States citizens literate in Spanish should be permitted to vote upon demonstrating such literacy:

> New York registers those who have completed six years of school in a classroom where English is the medium of instruction and those who pass an English literacy test. There is no rational basis--considering the importance of the right at stake--denying those with equivalent qualifications except that the language is Spanish. Thus appellant has, quite apart from any federal legislation, a constitutional right to vote in New York on a parity with an English-speaking citizen --either by passing a Spanish literacy test or through a certificate showing completion of the sixth grade in a Puerto Rican school where Spanish was the classroom language. In no other way can she be placed on a constitutional parity with English-speaking electors.(17)

Justice Douglas would write again in the interest of linguistic minorities, but the next time for a unanimous Court in *Lau v. Nichols* (18).

LAU v. NICHOLS

Even the most prescient could not foresee at the time of its passage that Title VI of the Civil Rights Act of 1964 (19) would become a principal weapon of linguistic minorities in their battle to establish bilingual programs and gain equal schooling. In 1964 the renaissance of bilingual education had barely begun, enactment of the Bilingual Education Act was still four years away, and a national consciousness of the need for bilingual education had not yet been evoked. Relatively few schools received federal monies in 1964, but by the time *Lau* was decided a decade later, virtually all of the nation's school districts were

receiving federal aid (20) and fell within the prohibitions of Title VI: "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.(21)" Because each school district receiving federal monies must agree to comply with this antidiscrimination provision, Title VI has become an increasingly powerful lever for eradicating discrimination in education.

Two different developments were important in setting the stage for the application of Title VI in *Lau*. First, soon after passage of the statute, the right of private individuals to sue for enforcement was established (22). Second, in 1968 HEW promulgated Title VI regulations and guidelines pertaining to the schooling of children of national origin minority groups (23).

The Lawsuit

Lau v. Nichols was brought by Chinese public school students against the San Francisco Unified School District in 1970. The parties did not dispute the critical facts that 1,790 Chinese students received no services designed to meet their linguistic needs and that these students suffered educationally. (The parties also agreed that 1,066 Chinese speaking students did receive some form of compensatory education.) What was in question was whether non-English speaking students receive an equal educational opportunity when instructed in a language they cannot understand.

The plaintiffs claimed that the absence of programs designed to meet the linguistic needs of such students violated both Title VI and the Equal Protection Clause of the Fourteenth Amendment to the Constitution. They urged that equality in education goes beyond providing the same buildings and books to all students and includes intangible factors (24). Because they could not understand the language of the classroom, the Chinese students argued, they were deprived of even a minimally adequate education, let alone an education equal to that of other children. They claimed that their educational exclusion was a function of state action since school attendance was compulsory (25), the use of the English language was mandated by the state (26) and fluency in English was a prerequisite to high school graduation (27). The difference in treatment, the plaintiffs contended, amounted to invidious discrimination because it affected a distinct national origin group (28). They argued that the Constitution prohibited withholding from them the means of comprehending the language of instruction.

All these claims were rejected by the federal district

court. The court ruled that the students' rights to an equal educational opportunity had been satisfied by their receipt of "the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District.(29)" The Ninth Circuit Court of Appeals affirmed, with one dissent. That court ruled that the uniform use of English does not constitute unlawful discrimination and declared that English language instruction must be paramount in the schooling process (30).

The *Lau* petitioners then presented their case to the Supreme Court. At this point, because HEW was concerned with the impact of the lower court decisions on its policies regarding non-English speaking students and on its authority to govern the use of bilingual education funds, the United States requested and was granted permission to argue in support of the *Lau* petitioners as *amicus curiae*. Although the federal government raised the same constitutional arguments as the plaintiffs (31), its presentation rested largely on Title VI guidelines and on its right to place reasonable conditions on the receipt of federal monies. The government reasoned that the Ninth Circuit had erred in dismissing the federal statutory claim based on Title VI as if it were no different from the claim of Fourteenth Amendment rights (32). It stressed that the HEW regulations and guidelines construing Title VI were entitled to great weight according to prior Supreme Court decisions (33). No matter how the Supreme Court might construe the principles of the Equal Protection Clause as applied to *Lau*, the government argued, HEW's interpretation of Title VI outlawed the actions of the San Francisco school district. The Supreme Court unanimously agreed, avoiding the constitutional issue and relying solely on Title VI (34).

The *Lau* opinion touches on fundamental issues of what constitutes equal treatment, and it may be construed as going beyond the ruling that HEW can promulgate reasonable regulations and guidelines in implementing acts of Congress (35). The Court considered whether students who do not understand English receive equal treatment when English is the sole medium of instruction and no additional steps are taken to teach them English. It reasoned: "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education (36).

The lower courts had ruled that offering identical services to all students is sufficient to meet the strictures of the Equal Protection Clause and implicitly of Title VI, even though students actually received disparate benefits because of significant differences in their opportunities to

take advantage of those services. Rejecting this analysis, the Supreme Court relied on the Title VI regulations and guidelines which speak to equality in the offering and receipt of benefits: "It seems obvious that the Chinese-speaking minority receives fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program--all earmarks of discrimination banned by the regulations.(37)"

A critical underpinning of the Court's decision was a memorandum issued by HEW on May 25, 1970 (38), regarding children of national origin minority groups with limited English language skills. The memorandum informed school districts that they must take affirmative steps to rectify English language deficiencies--steps that would go beyond providing the same books and teachers to all pupils. The Court reinforced this requirement. Construing Title VI broadly, it found that the statute proscribes treating different people identically when the results will be unidentical. Any narrower view might have led the Court to disregard the Title VI regulations and guidelines as going beyond the scope intended by Congress for Title VI and, accordingly, as imposing an unauthorized condition on the disbursement of federal money (39).

Although bilingual education was the relief originally demanded in the complaint, by the time *Lau* reached the Ninth Circuit Court this request for specific relief had been abandoned, and all that was sought was effective affirmative steps on the part of the school district. The Supreme Court opinion did not mandate a specific approach to teaching national origin students with English language problems. As Justice Douglas noted at the outset of the Court's opinion:

> No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation.(40)

In response to this Supreme Court mandate, the San Francisco Board of Education approved a modified version of a master plan prepared by a citizens' task force. The district court entered a consent decree providing for a bilingual-bicultural program for the Chinese, Filipino and Spanish language groups in the school district. The 10,903 students who comprised these three groups constituted 82 percent of San Francisco students who spoke little or no English. For

students from other language groups, the decree required the implementation of ESL and other special programs, including, where feasible, bilingual instruction. Responsibility for monitoring implementation of the decree was placed with a community council established and given administrative support by the school district.

The Supreme Court has emphasized that neither the Constitution nor federal law should or does convert courts into school boards (41). Educational policy is a state function, and the Court has declared itself "ill-equipped to determine the 'necessity' of discrete aspects of a state's program of compulsory educatio...(42)" Even in cases that limit the power of the states to govern education, whether in the specific area of language instruction (43) or in the more general area of compulsory public school attendance (44), the courts are reluctant to interfere with the manner in which school authorities design and enforce minimal educational standards (45) or, indeed, pay for the education offered to students (46). However, counterbalancing this deference to the policies of local school officials are the stringent standards courts impose when discrimination on the basis of race or national origin is at stake. In *Lau*, there is no question that the language discrimination perpetrated by the San Francisco school district was construed as national origin discrimination, since Chinese children were involved.

In cases of language discrimination, as in other school-related discrimination cases involving race or national origin (47), districts that have violated their duty to take affirmative steps to rectify language difficulties have the burden of presenting a plan and demonstrating to the courts its effectiveness in remedying their unlawful failure to open the instructional program to language-minority students (48). The remedial standard that binds courts in desegregation cases--namely, whether the school district is offering a remedy that "promises to realistically work now (49)"--may be equally applicable to cases brought under *Lau*. The HEW memorandum of May 25, 1970, is in accord with this standard and requires that a school district's affirmative steps "must be designed to meet...language skill needs as soon as possible.(50)"

THE AFTERMATH OF *LAU*

The nationwide impact of the *Lau* ruling has been manifested in legislation at the federal and state levels and in several lawsuits. Seven months after the ruling, Congress codified the Court's holding in the Equal Educational Opportunity Act of 1974 (51). Significantly, the new federal legislation extended *Lau* to all public school districts, not just those receiving federal financial assistance: The

proscription of *Lau* cannot now be circumvented by a school district spurning federal funds. Congress also recognized how important staffing is in any effort to fulfill the federal rights of linguistic minorities: Although the act contained a general ban against discrimination in teacher hiring and assignment, it excepted from this ban staffing to fulfill the mandate to overcome the language barrier (52). Also in the wake of *Lau*, numerous state legislatures have passed statutes mandating bilingual education (53).

Two decisions since *Lau*, *Serna v. Portales Municipal Schools* (54) and *Aspira of New York, Inc., v. Board of Education of the City of New York* (55), have resulted in court-mandated bilingual programs. A third decision, *Rios v. Read* (56), discussed the school district's responsibilities, indicating that unless the district's bilingual program was effective, a *Lau* violation would be triggered the same as if no program were offered. A fourth, *Otero v. Mesa County Valley School District No. 51* (57), rejected all claims of national origin discrimination and, having found no *Lau* violations, never reached the knotty remedial problems. And, most recently, a fifth decision, *Cintron v. Brentwood Union Free School District Board of Education* (58), examines the applicability of the Supremacy Clause to a potential conflict between the rights of linguistic minority students under federal law and teachers' rights under state tenure law. Two other cases raised issues of Native American bilingualism in the schools. Both ended in consent decrees, but neither case exclusively concerned bilingual education (59).

Serna v. Portales Municipal Schools

In 1972, Chicano students challenged the English-only instructional program in the schools of Portales, New Mexico. After hearing testimony from teachers, school administrators and educational psychologists, the court found a violation of the students' constitutional rights to an equal educational opportunity and ordered that bilingual instruction be provided. The court rejected the school board's proposed program as tokenism and ordered the adoption of the bilingual education program submitted by the plaintiffs. The Portales school officials, with the support of the New Mexico State Board of Education, appealed the decision.

Before the appeal was heard, the Supreme Court decided *Lau*. The Tenth Circuit Court of Appeals, noting that *Lau* and *Serna* were almost identical, affirmed the trial court's ruling under Title VI but, like the Supreme Court, declined to decide the constitutional claim. In upholding the trial court's adoption of the plaintiffs' plan for bilingual instruction, the Tenth Circuit held that the school-children had a right to bilingual education (60).

The amount of bilingual instruction ordered was not extensive compared to what has been implemented elsewhere. In the one elementary school where 86 percent of the students were Spanish surnamed, all students in grades one to three were to receive 60 minutes of bilingual instruction per day, and students in grades four to six were to receive 45 minutes per day. In the remaining three elementary schools, where the enrollment was predominantly Anglo, only 30 minutes of bilingual instruction was mandated for all grades. No minimum amount of bilingual instruction was ordered for students in junior high, and at the high school level only the offering of ethnic studies was required. The plan was particularly significant in that English-dominant Chicanos and Anglo students were required to receive some bilingual instruction.

Aspira of New York, Inc., v.
Board of Education of the City of New York

Also in 1972, Puerto Rican and other Hispanic students in New York City sued the city board of education, claiming that the commitments of school officials to bilingual education remained largely unfulfilled (61). Thousands of Hispanic students received instruction in ESL only, and tens of thousands received no instruction to meet their linguistic and cultural needs. Echoing the defense raised by the San Francisco school district in *Lau*, New York's board of education asserted that providing the same services to all students violates neither the Equal Protection Clause nor Title VI. The board also claimed that HEW and the state department of education were responsible for funding bilingual programs and, therefore, were indispensable parties to the lawsuit. The court rejected both defenses (62).

After the *Lau* ruling, the *Aspira* plaintiffs moved for summary judgment. The court ordered the defendants to undertake an extensive survey of the needs of the Hispanic students and the special services and personnel available to them. The court also directed the parties to submit plans for meeting the students' educational needs (63).

With the court's prodding, and after negotiations, the parties consented to a decree in August 1974. Under the consent decree, the school board is required to design and implement an improved method for assessing Hispanic students' skills in English and Spanish in order to identify those students with English language difficulties who, accordingly, have rights under *Lau*. For eligible students, instruction in core courses and other courses required for promotion and graduation must be offered in Spanish (64). The decree also mandates programs designed to develop children's ability to speak, read, write and understand English. It specifically rejects immersion as a technique of second

language acquisition and forbids pullout programs. So that segregation will not occur, students in the program must spend as much classroom time with students outside the program as their educational needs permit. Materials used in the program must reflect, where appropriate, the culture of the children involved. Recognizing the need for additional competent personnel, the decree calls for affirmative teacher recruitment and specifies the necessary teacher qualifications (65).

The consent decree, in large measure, is not an educator's document. Although it describes a bilingual program, includes standards for identifying students entitled to the program and sets forth teacher qualifications, it does not instruct educators in implementation--how to transform a plan on paper into a viable educational program. Furthermore, while the *Aspira* decree constitutes perhaps the most far-reaching court-ordered bilingual program since *Lau*, it does not reach all Hispanic students with rights under *Lau*. The *Lau* decision covers any students whose limited English language skills exclude them from the regular instructional program. The *Aspira* consent decree, by contrast, applies only to those students who can participate in the learning process more effectively in Spanish than in English. Hispanic students who are no more proficient in Spanish than they are in English do not fall within the class defined in the consent decree and are not offered the program under its mandate.

Rios v. Read

In the context of a motion to compel a school district sued under *Lau* to disclose its students' records, the opinion in *Rios v. Read* probed the obligations imposed on school authorities toward their non-English speaking students. Plaintiffs sought information concerning achievement levels, tenure in special ESL pullout classes, reading scores and attendance rates in an effort to assess whether the programs of the school district of Patchogue-Medford, Long Island, effectively promoted academic progress and second language fluency. Of the two principal defenses raised by the district in its effort to withhold the records, one focused on *Lau* (66). Arguing that *Lau* requires only that a school district take affirmative steps to meet the needs of non-English speaking students, the district maintained that an investigation of facts directed toward the effectiveness of those steps was irrelevant.

The district court acknowledged that the school district provided a remedial program for English-language-deficient children, that a bilingual department existed in the district and that New York State's policy is to encourage bilingual education, but it nevertheless rejected the notion

that *any* affirmative steps pursued by a school district satisfy *Lau*:

> It is not enough simply to provide a program for disadvantaged children or even to staff the program with bilingual teachers; rather, the critical question is whether the program is designed to assure as much as is reasonably possible the language deficient child's growth in the English language. An inadequate program is as harmful to a child who does not speak English as no program at all.(67)

For the first time, a district court amplified the holding of *Lau* by making reference to the legislative history of the federal Bilingual Education Act of 1974, in which Congress recognized the far-reaching implications of *Lau* and emphasized "the importance of bilingual education in the academic and personal growth of the language disadvantaged child.(68)" The court observed that increasing the quantity of bilingual programs was "meaningless without a concomitant emphasis on the quality of instruction.(69)" Relying on *Serna*, the court summed up:

> To put a final perspective on the defendants' position, it could hardly be argued that if a school district was found to violate the standards of *Lau v. Nichols* because it had failed to provide any bilingual education for language disadvantaged children, a court would be required to accept without scrutiny whatever remedial program the school district then proposes simply because the district now could claim that it was taking "affirmative steps.(70)"

For this district court, then, *Lau* is not a *carte blanche;* the standard of effectiveness governs for purposes of both liability and remedy when a school district is charged with offering inadequate programs (71).

Otero v. Mesa County Valley School District No. 51

Otero presents the most resounding rejection of a claimed right to bilingual education since the lower court decisions in *Lau*. The case demonstrates the judiciary's hesitancy to become involved in educational policy making, especially in the absence of the clear linguistic and educational evidence that would have proved critical to the plaintiff's case.

To force the introduction of bilingual education, Chicano school-children in Mesa County claimed that the programs

provided to them were inappropriate and violated their rights under Title VI and the Equal Protection Clause. The plaintiffs sought to establish that the principal cause for Chicano students' poor performance in school was that "District 51 has created a school system oriented for middle-class, Anglo children, [and] has staffed the system with non-Chicano personnel who do not understand and cannot relate with Chicano students who are linguistically and culturally different.(72)" In support of their claims, the plaintiffs relied heavily on the Cardenas-Cardenas Theory of Incompatibilities (73).

While *Otero* was being prosecuted, the appeal in *Keyes v. School District No. 1, Denver, Colorado* (74), involving the desegregation of the Denver schools, was decided by the Tenth Circuit. That appellate court reversed the district court's order that a bilingual education program based on the Cardenas-Cardenas Theory of Incompatibilities be included in a Denver desegregation plan. The *Keyes* appellate court found that the Cardenas plan "would unjustifiably interfere with...state and local attempts to deal with the myriad economic, social, and philosophical problems connected with the education of minority students.(75)" Relying heavily on *Keyes*, the *Otero* court held that the Fourteenth Amendment does not require school districts to offer bilingual-bicultural programs. It gratuitously added that the Cardenas plan, as applied to the defendant school district, was "illogical, unbelievable and unacceptable.(76)" Low academic performance on the part of Chicano students, the court found, was caused by socio-economic factors and not the failings or unresponsiveness of the educational program.

With regard to the *Lau* claim, the court found that few, if any, students in the district had "real language deficiency" and that the school board was "making a real, conscientious effort to recognize, face, and solve any problem which may exist as to any student.(77)" There was no discussion of the nature or the success of any special programs offered. In *Otero*, the court merely found that plaintiffs did not prove the necessary facts to establish a violation of either Title VI or the Fourteenth Amendment.

Cintron v. Brentwood Union Free
School District Board of Education

In the face of declining student enrollment, the Brentwood Board of Education decided to reduce its teaching staff significantly. The school district is second only to New York City in the number of Spanish speaking pupils in the state. Not surprisingly, the majority of the bilingual teachers had little seniority, and as a consequence of the operation of New York State teacher tenure law, the school district fired 18 of its 24 bilingual teachers (78).

Recognizing the need and its obligation to offer bilingual education to limited English speaking students, the school district attempted to retain its bilingual teachers by placing them in a separate tenure category. Despite these efforts, the New York State courts, in a lawsuit brought by nine monolingual English teachers threatened with layoffs, found that no special tenure existed for bilingual teachers, layoffs must proceed according to seniority, and no consideration could be given to the particular qualifications of these teachers (79).

The controversy shifted to federal court when Brentwood's Hispanic school children and their parents filed suit arguing that as a result of bilingual teacher layoffs the school district drastically altered and reduced its bilingual program so as to violate the mandate of *Lau* and 20 U.S.C. § 1703 (f), particularly as construed by the *Rios* decision--the new program design to be implemented in September 1977 was inadequate and ineffective, and several of the teachers to be used were unqualified and ill-trained.

Finding that it would be premature to declare state tenure law in violation of the Supremacy Clause, the court, as an interim measure, did order the school district to rehire experienced and qualified bilingual teachers, and to continue the bilingual program that was previously in place.

In setting the stage for further judicial proceedings, the court said:

> ...[T]he interaction of the staff reductions with [State Tenure Law] §2510 left the district with the choice of possibly violating federal law or keeping on its payrolls teachers whose services are no longer needed. If state law mandated the cutbacks, or if financial considerations make it impossible for the district to hire the more senior teachers, and, because of §2510 its only alternative is to lay off bilingual and ESL teachers, then a "direct and positive" conflict, *Kelly v. Washington*, 302 U.S. 1, 10, 58 S.Ct. 87, 92 (1937), *quoting Sinnot v. Davenport*, 63 U.S. (22 How.) 243, 247 (1859), exists between the application of the state tenure law and federal legislation governing the rights of language-disadvantaged children. Put another way, where compliance with both federal and state regulations is an impossibility, the state enactments must give way. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217 (1963).(80)

THE OPEN QUESTIONS OF *LAU*

Establishing a *Lau* violation by proving that a

school district offers no program to address the needs of limited-English-speaking students is easier than determining the type of program that will be sufficient to remedy a proven *Lau* violation. There is ample reason to believe that in judging a program's adequacy the courts will rely heavily on the standards set forth in HEW's *Lau* remedies (81), since the *Lau* decision must be read not only as upholding the May 25 memorandum, but also as reaffirming the general authority of HEW to issue and enforce reasonable interpretive guidelines consistent with the purpose of Title VI.

The *Lau* remedies do not mandate a specific approach to teaching national origin students with English language problems. Is *Lau*, therefore, a *carte blanche* to school districts to implement whatever programs they choose? The answer is obviously no. A program of immersing limited-English-speaking students in a regular English-only instructional program would not be adequate. It was this very type of "program" in which the plaintiffs in *Lau* were participating. English language training one hour a week also may not be sufficient to "rectify the situation." Similarly, standard fare remedial programs designed for and offered to monolingual English speaking students, should be an unacceptable alternative if not tailored to a student's linguistic needs. A "pullout" program in which a student is removed from major subjects to learn English is not satisfactory if the by-product is academic retardation. As in other education cases, the adequacy of the remedy will be its effectiveness.

It is wholly consistent with Supreme Court doctrine that no specific remedy was ordered in *Lau*. Decisions respecting remedies are almost always left to "the informed judgment of the district courts (82)" to solve "varied local school problems.(83)" In *Brown v. Board of Education* this policy was explicitly stated: "[D]istrict courts are to be afforded the widest latitude in fashioning appropriate and effective remedies.(84)"

School boards ordered to produce plans to remedy *Lau* violations will not be afforded unfettered discretion. Admittedly, the Supreme Court has emphasized that neither the Constitution nor federal law should or does convert courts into school boards. Educational policy is a state function, and the Court has declared itself "ill-equipped to determine the 'necessity' of discrete aspects of a state's program of compulsory education.(85)" Even in those cases limiting the reach of the state in governing education, whether in the specific area of language instruction or in the more general area of compulsory public school attendance, the courts are reluctant to interfere with the manner in which school authorities design and enforce minimal educational standards or, indeed, pay for them (86).

Counterbalancing this deference to the policies of

local school officials are the stringent standards courts impose upon local school officials when the issue of race or national origin discrimination is at stake. And, although *Lau* may be unclear in several respects, there can be no question but that the language discrimination perpetrated by the San Francisco School District was construed as national origin discrimination.

As in other school discrimination cases involving race or national origin, schools which violate their duty "to take affirmative steps" have the burden of presenting a plan and demonstrating to the court its effectiveness in remediating past unlawful practices of failing to open the instructional program to language minority students. The remedial standard binding courts in desegregation cases--a remedy which "promises to realistically work, and promises realistically to work now (87)" may be equally applicable to cases brought under *Lau*. The May 25, 1970 HEW memorandum is in accord with this mandate, and requires that a school district's affirmative steps "must be designed to meet... language skill needs as soon as possible....(88)"

Although passing upon the merits of particular instructional programs might seem to be the precise type of institutional metamorphosis *San Antonio Independent School District v. Rodriguez* sought to foreclose (89), the nature of a *Lau* violation will require courts to conduct this type of evaluation. Since courts will not accept any plan a school district proffers, indicia to gauge programs by the standard of equal benefits, the touchstone of Title VI, will have to be proposed. Where school districts default in their responsibilities to present effective programs to remedy *Lau* violations, courts will have no option but to develop their own (90).

However, it is one thing to fault a particular program and another to propose a demonstrably better alternative. Does bilingual education impede or facilitate second language acquisition? Does bilingual education positively affect the student's self-concept? Does bilingual education prevent academic retardation during the course of second language acquisition? Does bilingual education improve achievement?

The answers to these questions will be significant in persuading a court to reject one remedy and adopt another (91). Standardized achievement tests, grades, drop-out and absentee rates, are certainly probative as to whether a proposed remedy is effective in securing equality of benefits. Evidence concerning the program's success in developing second language fluency should be afforded substantial weight. Expert testimony from linguists, psychologists and educators knowledgeable in the instruction of non-English speaking school-children will be essential. Two significant factors in influencing a remedy are likely to be HEW's "*Lau*

remedies" issued in the summer of 1975 and the prior expressions of "expertise" by local school officials, many of whom have gone on record as committed to bilingual education, and who can be expected to be held to that commitment in considering issues of liability and remedy.

Enforcement

Compliance with the *Lau* remedies, as with any civil rights law, is secured only to the extent that enforcement efforts are vigorous and the threat of sanctions is real (92). The ultimate sanction for noncompliance--termination of federal funds--has rarely been invoked by HEW in recent years and has come to be regarded as a dead letter (93). HEW is more likely to adopt the less extreme method for encouraging compliance that it used, for example, when the Seattle school district refused to submit a voluntary *Lau* compliance plan: Deferral of future funding. HEW may also refuse to fund grant proposals submitted by districts suspected of noncompliance.

However, problems and delays in HEW's enforcement of Title VI suggest that the department is unlikely to act energetically on behalf of linguistic minorities. For example, Black students alleged, in *Adams v. Richardson* (94), that HEW had consciously and expressly abdicated its enforcement responsibilities under Title VI to end segregation in southern public schools receiving federal funds. The court agreed, finding HEW derelict in its duty to investigate Title VI complaints promptly and to initiate enforcement proceedings if its attempts to achieve voluntary compliance failed. Two years later the court had to act again in *Adams v. Weinberger* (95). Once again it found "an over-reliance by HEW on the use of voluntary negotiations over protracted time periods and a reluctance in recent years to use the administrative sanction process where school districts are known to be in noncompliance.(96)" The court noted that HEW was still delaying in its investigations and failing to bring enforcement proceedings.

The attack on HEW broadened with *Brown v. Weinberger* (97) which challenged HEW's practice of continuing to provide federal funds to public schools in 33 northern and western states despite these schools' alleged violations of Title VI. *Brown v. Weinberger* went beyond *Adams v. Richardson* in that discrimination based on national origin, as well as race, was alleged. The decision in *Brown v. Weinberger* chronicled HEW's continuing failure to enforce Title VI. It found that some Title VI investigations had been pending for eight years, during which period HEW had neither determined whether the school districts involved were in compliance with Title VI nor initiated enforcement proceedings. In other school districts, where HEW had

found noncompliance with Title VI (after investigations lasting up to seven years), the department had failed to achieve voluntary compliance yet had commenced no enforcement efforts; these school districts continued to receive federal funds. Still other school districts, although declared by HEW to be ineligible for Emergency School Aid Act (ESAA) assistance, nonetheless received substantial federal funds from HEW under other statutes. The court gave HEW 60 days to complete its investigations and commence enforcement proceedings against the school districts named.

Filing administrative complaints with HEW is one way of trying to obtain needed programs in bilingual education (98), but this approach is fraught with problems and delays. Considering the dissatisfaction of minority groups with HEW's past enforcement efforts, it is to be expected that people seeking bilingual education for their schools will continue to turn to the courts. The threat of a lawsuit to compel local educational agencies to establish bilingual education programs can be a deterrent to noncompliance. The lawsuit can come unexpectedly from a community too outnumbered or politically weak to influence local educational policies through traditional means. Defending a lawsuit costs money, and, with resources dwindling, school boards cannot ignore such costs. Although bringing lawsuits also costs money, reimbursement for attorneys' fees awaits plaintiffs who succeed in court or through settlement (99).

Lawsuits may not only deplete the treasuries of school boards but may also result in money damages against administrators. As the Supreme Court has said: "In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another.(100)" It may be true that school officials who can demonstrate good faith and their own reasonable belief in the legality of their acts are insulated from suits seeking compensatory and punitive money damages. And it certainly is true that school officials are under no duty to anticipate unforeseeable developments in the law. But the well-worn adage that ignorance of the law is no excuse holds here: Claimed ignorance of the *Lau* rights of students may not shield school officials who violate these rights (101). Furthermore, if school officials fail to implement court orders, including consent decrees, they will be subject to the contempt powers of the court (102).

COMMON DEFENSES

Budget

Frequently, school boards argue, in court and out, that budget constraints excuse their failure to provide bilingual programs. Underlying this defense is the assump-

tion that bilingual programs cost more than traditional programs--an assumption which has not been substantiated. But, even where school districts can show that bilingual programs in fact require additional expenditures, the budget defense may not prevail. Although a claimed right to bilingual education under *Lau* flows from a federal statutory guarantee of equal educational opportunity rather than the Constitution, the principle that federal rights are not to be denied or deferred because of budget constraints should still be applicable (103).

In *United States v. Texas Education Agency* (104), the continuing desegregation litigation concerning the Austin public schools, the court discussed at length the question of costs. Austin school officials argued that the economic costs of dismantling a segregated school system is relevant to the determination of whether a constitutional violation exists, and even if not, that "root and branch desegregation" should not be ordered because of the costs. Rejecting both arguments, the court quoted the controlling principles of *Swann*:

> ...a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.(105)

But the economic costs, the court noted, are not relevant at the liability stage, and though they are a factor to be considered in the balancing of interests at the remedy stage, the constitutional violation must be rectified:

> [T]he Court must determine the least costly method of correcting the constitutional violation. But ...however the balancing of interests is resolved, the constitutional violation must be corrected. (106)

Directly addressing the issue of funding bilingual programs, the court stated:

> The [Austin Independent School District] has an ongoing bilingual-bicultural education program that the Superintendent of Schools testified would continue "regardless of the level of federal funding." Indeed, state and federal law require as much. See 20 U.S.C. § 1703(f); Tex. Educ. Code Ann. § 21.451 *et seq.* (1975 pocket part). See also *Lau v. Nichols* [citation omitted]. The

district court properly made this commitment a part of its decree (107).

While there is serious doubt as to a federal court's power, much less inclination, to order the levying of taxes, and no doubt that such courts may not alter a state's system for financing education (108), there is authority to require public bodies to reallocate existing and available resources to fund court-ordered programs to assure a viable remedy.

In *Mills v. Board of Education*, the court stopped short of ordering an increase in appropriations to provide immediate and adequate educational programs for handicapped children, but did rule that:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.(109)

To allocate substantial resources to sports programs, new furnishing and equipment for administrators, or salaries for personnel not delivering essential courses, but to claim that insufficient resources foreclose instruction in a language students understand, may be grounds for a reordering of expenditures. Items of obvious secondary educational importance may have to yield to programs necessary to meet effectively the mandate of Title VI (110). A failure to reallocate resources may ultimately result in a cut-off of federal assistance for noncompliance with Title VI (111). Thus, to deny non-English speaking students their *Lau* rights on the grounds of fiscal plight may only further reduce the education budget.

The budgetary defense rests in most instances on the claimed need to hire more teachers, producing add-on personnel costs. Unless a school system contemplates providing students in bilingual programs with more teachers than their English monolingual counterparts, the cost of personnel for students entitled to bilingual programs should not impose a significant, additional fiscal burden on a school district. Since all students are assigned teachers, providing a bilingual teacher should cost no more than providing a monolingual one (112).

Another cost-related argument advanced by local school officials is that if required to implement bilingual programs, then the State and HEW should share the burden of their financing. In *Aspira*, the court rejected this argument and refused to join federal or state agencies as indispensable parties to the lawsuit.

Contract Rights

What if teacher contract rights clash with student rights under *Lau*? May teacher hiring, retention and qualification provisions of these agreements frustrate the implementation of a program to meet the demands of *Lau*? May unqualified monolingual teachers be retained and bilingual teachers with less seniority be laid off if the result is to curtail bilingual instruction to students in need? One federal court has recently discussed some of these difficult questions (114). Several state courts have addressed these issues, but only in the context of contract or tenure disputes between bilingual and nonbilingual teachers, where the rights of affected students were not considered.

In faculty desegregation cases, school districts have attempted to raise union contract or state tenure statutes to resist federal court orders to reassign faculty. The argument has failed consistently (115). The same result should follow notwithstanding the statutory premise of *Lau* since the Supremacy Clause of the Constitution requires that federal law prevails when in conflict with state law (116).

Number of Students

School districts commonly attempt to justify noncompliance with *Lau* by demonstrating, as in *Otero*, that the number of students in need, but not in receipt of appropriate programs, is insignificant. How many limited-English-speaking students who receive no special language instruction must there be to establish a *Lau* violation and to obligate a school district to undertake affirmative remedial efforts? In *Lau*, two members of the Court, Justice Blackmun joined by Chief Justice Burger, concluded in a concurring opinion that special instruction would not be required where the case involved "a very few youngsters or...just a single child who speaks only German or Polish or Spanish or any other language other than English...[since] numbers are at the heart of this case.(117)" Inasmuch as the 1,800 Chinese students in *Lau* represented in their view a "substantial group" this caveat would not apply.

The opinion for the unanimous Court, however, states no numerosity requirement. Title VI speaks of individual and not group rights in providing that "no person" in federally-assisted programs shall be subject to discrimination.

In codifying the holding in *Lau*, the Equal Educational Opportunity Act of 1974 (118) adheres to the majority view. Under the Act, no education agency "shall deny equal educational opportunity *to an individual* on account of his or her...national origin..." by failing "to take appropriate action to overcome language barriers [emphasis added].(119)" The statute nowhere intimates that it only applies to substantial groups of students, and the references to "an individual" strongly imply the contrary (120).

Nevertheless, the Blackmun view was echoed in *Serna* and followed in *Otero v. Mesa County Valley School District No. 51* (122). And, in extending the *Lau* doctrine beyond education to the area of unemployment insurance benefits, a New York federal court in *Pabon v. Lavine* adopted the Blackmun caveat that "numbers may be at the heart of the matter.(123)" Precisely what constitutes a "substantial group" to satisfy the Blackmun caveat is not fixed, although the outer perimeter may safely be drawn at 1,800 (124).

On the matter of numbers, the "*Lau* remedies" seemingly seek to strike a balance. The "*Lau* remedies" recognize that even a single, isolated limited-English-speaking student has rights under *Lau* and the Equal Educational Opportunity Act. To satisfy those rights, and address the educational needs of the isolated child, some affirmative steps must be taken for all such children. However, OCR has not taken the position that the special programs for such children must be as extensive and sophisticated as for children in groups where there are 20 or more children of a particular national origin group with a non-English home language (125).

Practical considerations, particularly the distribution of entitled students among schools within a school district, probably will be the rule of thumb. In determining the feasibility of organizing bilingual programs, courts are likely to rely on the numerosity standards of the "*Lau* remedies," and the bilingual education statute, if any, of the state in which the court sits.

Avoiding Minority Student Segregation

Bilingual education frequently is seen by its skeptics as the precursor of political and ethnic separatism, fracturing the fabric of schools and threatening to divide communities along rigid ethnic-racial lines. These critics support their view with repeated references to bilingual communalism in Canada, Belgium, India and Cyprus (126). Consequently, bilingual education advocates often are met at the schoolhouse door with demands for assurances that separation of minority from nonminority students will not follow the implementation of bilingual programs.

Meeting the particular educational needs of non-English speaking students need not present a Hobson's choice of

electing either segregated bilingual education or no bilingual education. Using established teaching methodologies or introducing innovative ones allows bilingual instruction to be offered in a heterogeneous setting (127).

Bilingual programs having a mix of both minority and nonminority students avoid any issue of unlawful separation. It has been argued, however, that when the number of nonminority students in a bilingual program approaches or exceeds that of the minority students, the character of the program is jeopardized (128).

The organizing of a "mixed" bilingual class assumes the availability of enough nonminority students willing to participate in bilingual instruction. The fulfillment of a school district's duty to establish bilingual programs for those in need cannot await nor should it be dependent upon the success of recruiting nonminority "volunteers." Courts may direct Anglo involvement in bilingual programs (129), but the drawbacks of coerced attendance may outweigh any benefits to the program as a whole.

Even if bilingual programs for students with limited English language skills result in ethnic separation within schools, prevailing case authority and federal regulations may sanction them as *bona fide* ability groupings (130).

Both the 1968 HEW regulations and the May 25, 1970 memorandum upheld in *Lau* bar "segregation and separate treatment,(131)" but neither should be construed to preclude bilingual classes composed of a single national origin group for all, or part, of a school day. Nor should they be read to preclude bilingual programs in schools that are predominantly minority. What is prohibited are programs, including bilingual ones, that in fact or by design, fail to rectify English language deficiencies and instead separate and exclude students in such programs.

The "*Lau* remedies" interdict creating, and arguably perpetuating, ethnically identifiable schools in order to meet the special language needs of national origin minority group children (132). But, maintaining of existing bilingual programs in ethnically identifiable schools (which are not otherwise unlawful) is not prohibited by the "*Lau* remedies."

With respect to classes within schools, the "*Lau* remedies" state that bilingual programs "do not justify the existence of racially/ethnically isolated or identifiable classes, *per se*" and incorporate by reference existing Emergency School Aid Act (ESAA) and Title VI regulations (133). The applicable ESAA regulations are particularly instructive and deserve review (134). Schools which assign students to or within classes in a manner resulting "in the separation of minority group from nonminority group children for a substantial portion of the school day..." are ineligible for ESAA funding (135). The pertinent regulations

interpret "substantial" to prohibit separation "for more than 25 percent of the school day classroom periods (136)." *Bona fide* ability groupings (137), however, are exempted from this prohibition and the separation of minority from nonminority may exceed 25 percent of the day. Unless a racially or ethnically identifiable class or grouping is a *bona fide* ability group, where the separation is for more than 25 percent of the day, a presumption is raised that classroom or tracking assignments are impermissibly based on race, color or national origin (138).

In *Board of Education, Cincinnati v. Department of HEW*, these ESAA regulations were held to be a reasonable and proper exercise of HEW's regulatory authority and "well designed for the purpose of 'furthering federal education policy.'(139)" As the court observed, the ESAA regulations are consistent with established case law (140) which permits student assignment to separate classes or tracks on the basis of ability provided such assignment "is not a subterfuge for racial discrimination.(141)" In the context of one desegregation case, *McNeal v. Tate County School District*, the Fifth Circuit said of ability groupings:

> ...like any other non-racial method of student assignment, [they are] not constitutionally forbidden. Certainly educators are in a better position than courts to appreciate the educational advantages or disadvantages of such a system in a particular school or district. School districts ought to be, and are, free to use such grouping whenever it does not have a racially discriminatory effect. *If it does cause segregation, whether in classrooms or in schools, ability grouping may nevertheless be permitted in an otherwise unitary system if the school district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities* [emphasis added]. (142)

Bilingual programs which are organized so that minority children are separated from nonminority students for more than 25 percent of the school day should have no difficulty satisfying the ESAA requirements--with one caveat. The regulations provide that in the case of national origin minority group children, the device used to group them must "not essentially measure English language skills.(143)" This provision was apparently designed to avert misclassification and consequent misplacement of non-English speaking national origin minority group children into slow track or special education classes by administering linguistically and culturally biased tests (144). This single provision

cannot be reasonably read to rule out bilingual classes as *bona fide* ability groupings, however. Identifying students in need of bilingual education obviously requires the use of a procedure or instrument to measure English language skills (145).

BILINGUAL EDUCATION AND DESEGREGATION

The overriding mandate to desegregate will present formidable obstacles to organizing bilingual programs that are educationally viable and also meet the student-assignment guidelines fixed by the courts (146). But bilingual education and desegregation need not be headed on a collision course; these educational goals are not necessarily mutually exclusive. Bilingual education programs were first judicially mandated in 1970, four years before *Lau*, as part of the overall remedy in a Texas desegregation case (147). Because of the broad remedial powers exercised by the courts to eliminate unlawful school segregation, desegregation cases continue to serve as convenient vehicles for court-ordered bilingual education programs. Since a court's power to right unlawful school segregation (a constitutional wrong) may well be greater than its power to redress a *Lau* violation (a federal statutory violation), desegregation cases may provide the best hope for achieving comprehensive court-mandated bilingual education programs.

The Court's Remedial Powers

The expansion of the court's equitable powers to remedy school desegregation was painstakingly slow. Despite the Supreme Court's declaration in 1955 in *Brown v. Board of Education* (*Brown II*) that a district court's remedial authority to desegregate was broad (148), the "all deliberate speed" proviso only invited delay. Not until the 1960's did a series of Supreme Court decisions begin to close the gap between the time a school district was found to violate the principles of *Brown v. Board of Education* (*Brown I*) and the time for the implementation of an effective remedy.

In 1963, the Court stated that "deliberate speed" did not countenance indefinite delay (149). The following year, it emphasized that "[t]he time for mere 'deliberate speed' [had] run out,(150)" and in 1965 ruled that "delay in desegregating school systems [was] no longer tolerable.(151)" By 1969, the Supreme Court declared that the "obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.(152)"

In accelerating the deadlines for desegregation, the Court also expanded the remedial authority of lower courts to ensure complete and effective desegregation. In *Green v.*

County School Board of New Kent County, Virginia, the Court announced that school officials guilty of unlawful school segregation must take "whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.(153)" And, in 1971, the High Court handed down its decision in *Swann v. Charlotte-Mecklenburg Board of Education*, ruling that: "[A]ll vestiges of state imposed segregation" had to be removed and "[o]nce a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.(154)"

Consequently, by 1970 the mandate to desegregate had reached a crescendo, and the broad remedial powers of the courts were firmly embedded. In that year, for the first time, a federal district court in Texas required the implementation of a desegregation plan that reflected curricula changes designed to meet the needs of the non-English speaking students (155), and a subsequent decision in the same case required the inclusion of bilingual-bicultural programs (156). The court wrote:

> Having determined that the Mexican-American students...in the San Felipe Del Rio area may be and, indeed, for current educational purposes, must be considered as members of a cognizable ethnic or national origin group, the relief in this case becomes fundamentally similar to that which has been framed in school desegregation suits before this Court based on discriminatory treatment of black students. The mandate, as directed by the Supreme Court, is to "eliminate discrimination root and branch," and to create a unitary school system "with no black [Mexican] schools and no white schools but just schools."
>
> Just what is a unitary school system? The Supreme Court has offered as yet little explanation beyond saying that in such a system, no child will be effectively denied equal educational opportunities, and that the system shall exhibit the greatest amount of actual desegregation possible. Although these phrases are general and were made in the context of black-white desegregation, this Court finds them to be useful guidelines in this case. [L]ittle could be more clear to the Court than the need...for special educational consideration to be given to the Mexican-American students in assisting them in adjusting to those parts of their new school environment which present a cultural and linguistic shock. Equally clear, however, is the need to avoid the

> creation of a stigma of inferiority akin to the "badges and indicia of slavery...." To avoid this result the Anglo-American students too must be called upon to adjust to their Mexican-American classmates, and learn to understand and appreciate their different linguistic and cultural attributes. The process by which all students participate in a joint learning and adjustment process will not only constitute an educational enrichment but, also, will bring the school system as a whole closer to that goal or state-of-being referred to by the Supreme Court as a "unitary system." It is with this goal in mind, therefore--that of true integration as opposed to mere desegregation or, as Texas media are wont to term it, "racial mixing"--that the Court issued its major order in the case of San Felipe Del Rio Consolidated Independent School District [citations omitted]. (157)

Past Segregation of Non-Black Minority Students

Those who fear that bilingual education will promote separatism through segregated schools or classes should be reminded that many of the minority groups now supporting bilingual education were themselves victims of segregatory education practices. These same groups are alert to the fact that past segregation of non-Black minority students often was justified on the basis of purported English language deficiencies, when the actual intent was clearly not compensatory education, but rather the perpetuation of naked racism. But the limited separation which may, but need not, accompany the establishment of bilingual programs has neither the same intent, purpose nor effect of these past practices.

Contrary to popular belief, laws mandating school segregation were not peculiar to the southern and border states (158), nor were such laws aimed at Black children only. Until 1947 in California, state law permitted the establishment of separate schools for Chinese, American Indian, Japanese and "Mongolian" students (159). Mexican American students were not excluded by statute from White schools in California, nor in the Southwest generally. The absence of express legislative authority did not deter school officials from establishing and maintaining "Mexican-only" schools. In many school systems in the Southwest, Mexican Americans were "historically separated in fact from Anglos, although the separation never had a statutory origin.(160)" Some school authorities justified these "Mexican" schools, claiming that the students' English language difficulties necessitated the establishment of separate schools (161). Not

surprisingly, in these school districts only Mexican American students were singled out and separated in this way, although other non-English speaking children of recent immigrants were mainstreamed. In Texas, as early as 1907, there was a "Mexican school" established in Uvalde "apparently as the result of the language problem.(162)" Arizona schools segregated Mexican American students in the same way (163). California schools also practiced segregation camouflaged in this manner (164).

Tri-Ethnic Desegregation

In the face of the persistent and long-established discrimination against Mexican American school-children in the Southwest, one would have expected the Supreme Court to begin to untangle the problem of school segregation as it related to those children before 1973, when the Court decided its first northern desegregation case, *Keyes v. School District No. 1, Denver* (165). The Court took the opportunity in *Keyes* to enunciate the controlling legal standards for determining unconstitutional *de jure* school segregation, and to clarify the distinction drawn between *de jure* and *de facto* segregation (166).

The Court in *Keyes* also, for the first time, outlined how Mexican American students were to be treated (or more accurately, counted) in the context of desegregation. The case seemingly settled the question of whether Hispanic students were to be considered minority or nonminority students in a tri-ethnic school system by ruling that: "[S]chools with a combined predominance of Negroes and Hispanics [should be] included in the category of 'segregated' schools.(167)"

The *Keyes* directive to treat Mexican Americans as "minority" students turned on its finding that they "suffer[ed] the same educational inequities as Negroes and American Indians.(168)" A narrow reading of *Keyes* would limit this finding only to Chicanos in the Southwest, and there is support for this view (169). However, courts, in applying *Keyes*, have interpreted this aspect of the holding expansively, neither restricting "Hispanos" to Chicanos in the Southwest, nor requiring a showing of "identical discrimination." Puerto Ricans, Cubans, other Hispanics, Asian Americans and Indians have been treated as "minority students" by courts at the liability and remedial phases of desegregation cases (170).

Despite more than a decade of authority that courts may reorganize school systems to remove all vestiges of segregative schooling, there are signs that the scope of a court's equitable power to issue broad remedies in desegregation cases is being reconsidered, and the issue may soon be revisited by the Supreme Court. The most recent decision,

Keyes v. School District No. 1, Denver (171), the Denver desegregation case, is the first harbinger that the breadth of desegregation remedies, particularly as related to ordering bilingual education, may become more narrowly circumscribed.

A central feature of the desegregation plan adopted by the district court in *Keyes* and proposed by the Mexican American intervenors, was the Cardenas plan. To implement the Cardenas plan on a pilot basis, the desegregation plan left intact four schools overwhelmingly Chicano. On appeal the Tenth Circuit rejected the Cardenas plan, finding that the district court "overstep[ped] the limits of its remedial powers,(172)" and relying on the authority of *San Antonio School District v. Rodriguez*, the court ruled that the Cardenas plan would unjustifiably infringe upon state and local educational prerogatives (173).

No proof was offered in the lower court to establish that the existing curricula discriminated against Chicanos, according to the Tenth Circuit, and the Denver public schools' failure to offer to Hispanic students an "educational experience tailored to their unique cultural and developmental needs," did not violate the Fourteenth Amendment (174). No proof of English language disabilities was presented to the district court, and therefore, the Cardenas plan could not be supported by a *Lau* violation. Without the Cardenas plan, there was no justification for maintaining identifiably Chicano schools. And, to remove any lingering doubts, the Tenth Circuit cautioned that bilingual education is no substitute for desegregation (175). In remanding the case to vacate the Cardenas plan, the court directed that a determination be made of the relief, if any, "necessary to ensure that Hispano and other minority children will have the opportunity to acquire proficiency in the English language.(176)"

Keyes contains only two passing references to its prior decision in *Serna* and the Supreme Court's decision in *Lau* (177). Both *Lau* and *Serna* presented no obstacle to the *Keyes* ruling, according to the court, since in both the constitutional issue was not reached; a violation of Title VI for failing to provide language instruction to substantial numbers of non-English speaking children was the only issue decided.

The most significant aspect of the latest *Keyes* decision is its restrictions on the scope of the district court's equitable authority. These restrictions seem inconsistent with the same court's approval of the remedial order in *Serna* (initially forged on a finding of a Fourteenth Amendment violation and later, on appeal, upheld on the basis of Title VI) which was a relatively broad decree. The district court ordered a bilingual program more extensive than the program proposed by the defendants, including

provisions for evaluation, ethnic studies, recruitment of qualified bilingual teachers and the incorporation of non-Chicano students in the program. The Tenth Circuit expressly acknowledged that the district court went beyond the bilingual-bicultural plan recommended and presented by the school district (178).

Although the Tenth Circuit referred to "unique circumstances" in *Serna*, neither it nor the lower court pinpointed the distinguishing aspects of the Portales schools. Comparing the findings in *Serna* to those in *Keyes* raises difficult questions as to whether Denver and Portales were substantively different in their treatment of Chicano students. Achievement levels and I.Q. tests were relied on as indicia of inequality by both district courts. Diminished self-concept was accepted by both courts as a factor creating inequality, and both related self-concept to imbuing the schools with aspects of the Chicano culture. Alienation of minority students was the central theme of both courts in their respective conclusions that the equal protection clause was violated.

Considering the nature of the proof and the relief in both cases, the distinction drawn by the *Keyes* court is unsatisfactory. The *Serna* court's *dictum* approving the lower court's constitutional holding confirms that the *Keyes* distinction is at best mechanical (179). Why the Tenth Circuit in *Keyes* (but not in *Serna*) adopted the argument that the district court's relief "constituted an unwarranted and improper judicial interference in the internal affairs of the...school district (180)" can only be explained by the desegregation aspects of the Denver case, and an increasing hesitancy by courts to issue broad remedial decrees impacting on school districts without clear proof of a correlative violation of law (181). In *Serna*, the constitutional (and thereafter the statutory) violation was solely the failure of the school district to offer a curriculum to meet the educational needs of minority students; in *Keyes*, the focus was the segregation in the Denver school system.

Indeed, the Tenth Circuit found that the district court's desegregation plan was not sufficient to dismantle the Denver schools. The court could not be expected to approve identifiable minority schools, particularly when it was simultaneously ruling that the remedy had not gone far enough to desegregate the system as a whole. The ethnic groupings in the four pilot schools could not even be justified based on the students' language disabilities. Evidence on that issue had not been proffered and even if it had been, it is doubtful whether this court, with desegregation as its overriding concern, would have ruled differently. Although courts may go far in fashioning remedial desegregation orders, they must assure that desegregation is, in fact, achieved. As it evolved in Denver, the Cardenas plan threatened this aim.

Moreover, the thrust of desegregation is to offer the same education to all students regardless of race or national origin. The establishment of identifiable Chicano schools in the name of developing a greater sense of culture and self-concept might also permit the establishment of identifiable Black schools for the same reasons. Even if the creation of such schools is educationally sound, it does not pass muster under the Constitution, especially when a system is found to be operating segregated schools and the mandate is to dismantle them. If bilingual-bicultural programs are to be part of a desegregation remedy, they cannot and need not jeopardize the court's paramount concern to integrate.

Although the remedy ordered by the district court in *Serna* was far reaching in some respects, the Addendum to the Cardenas plan was a major overhaul of the Denver educational system (182). The court under these circumstances becomes somewhat indistinguishable from the school board. The degree of detail which went into the Addendum and made part of the record brought *Keyes* into conflict with the admonition of *San Antonio School District v. Rodriguez* warning against judicial encroachment into matters of educational policy.

The equitable remedial powers of the courts to effectuate desegregation, though broad, are not limitless. In *Swann* (183), the court noted that "the nature of the violation determines the scope of the remedy" and that in formulating relief, the task is to "correct...the condition that offends the Constitution." Applying this remedial standard to the metropolitan desegregation plan ordered in Detroit, the Supreme Court in *Milliken v. Bradley (Milliken I)* (184) found that by including suburban school districts which had not been shown to have violated the Constitution in the plan, the lower court had exceeded its remedial powers. The Court cautioned that there are "practical as well as legal limits to the remedial powers of federal courts in school desegregation cases.(185)"

Pasadena City Board of Education v. Spangler, where the Supreme Court found that the district court exceeded its authority in requiring the "annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena school...(186)" is further evidence that the equitable remedial powers of the courts are circumscribed. There is no substantive right to a particular degree of racial balance or mixing, and a desegregation order that contemplates such a right is infirm (187). These limitations on remedy were reaffirmed in *Dayton Board of Education v. Brinkman* (188), where the Court ruled that only if system-wide discrimination is shown may there be a system-wide remedy. Holding that the district court's findings of constitutional violations did

not suffice to justify the system-wide remedy ordered, the Supreme Court remanded the case to the district court for more specific findings and to fashion an appropriate remedy (189).

The authority of federal courts to draft decrees that order particular educational programs was clarified recently in *Milliken v. Bradley (Milliken II)* (190), in which the Supreme Court considered for the second time the remedy ordered in the Detroit desegregation case. *Milliken II* was the culmination of seven years of litigation over *de jure* segregation in the Detroit public school system. Three years earlier in the same case, as noted, the Supreme Court elaborated on the powers of the federal courts to order interdistrict "metropolitan remedies." The Court then found that the federal district court, in ordering a metropolitan desegregation plan, had exceeded the appropriate limits of its equitable authority by including suburban school districts in a segregation plan when they had been uninvolved with any constitutional violation.

The issue presented by *Bradley II* also involved the remedial powers of federal courts in desegregation cases, but now the Court directly addressed a question it had not previously ruled upon: Whether federal courts can order remedial educational programs as part of school desegregation decrees. The Michigan state department of education, ordered to share significantly in the funding of educational programs incorporated into the desegregation plan adopted by the Court, sought to upset the plan by arguing that the decree must be limited to pupil reassignments only. The Supreme Court found that matters other than pupil assignments must on occasion be addressed by federal courts to eliminate the effects of prior segregation. Discriminatory student assignments, the Court noted, can breed other inequalities which pupil reassignment alone does not automatically remedy.

The Supreme Court in its opinion reiterated the general equitable principles governing the formulation of school desegregation decrees. First, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation which must be related to the condition that offends the Constitution. Second, the desegregation decree must be remedial in nature and as nearly as possible make whole the victims of unlawful discrimination by restoring them to the position they would have occupied in the absence of such discrimination. Third, the plan must take into account the interest of state and local authorities in managing their own affairs. Applying these principles, the Court found that the inclusion of the educational components was proper. The remedy did not exceed the violation, but rather it was appropriately tailored to cure the condition that offended the Constitu-

tion--*de jure* segregation. The Court observed that there was ample evidence in the record of the case, including testimony by officials of the complaining Michigan state department of education, of the need for the enumerated educational programs. Moreover, the Court stressed that this need for the educational components "flowed directly from the constitutional violation by both State and local officials.(191)"

To emphasize that the Detroit desegregation plan was not novel in including remedial educational programs, the Court referred to numerous prior lower federal court decisions where remedial plans had gone beyond mere pupil assignments. Significantly, included in this review of cases was *United States v. State of Texas*, 447 F.2d 441 (5th Cir. 1971), the first desegregation plan to include a bilingual education program.

In language that may bode well for adherents of bilingual education, the Supreme Court observed in upholding the educational components that were aimed at Black children:

> Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. This is not peculiar to race; in this setting, it can affect any children who, as a group, are isolated by force of law from the mainstream. Cf. *Lau v. Nichols*, 414 U.S. 563 (1974)....Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures. In short, speech habits acquired in a segregated system do not vanish simply by moving the child to a desegregated school. The root condition shown by this record must be treated by special training at the hands of teachers prepared for that task.(192)

BILINGUALISM IN OTHER AREAS

Accommodating non-English speakers in areas other than education requires a showing that without bilingual services the protection of substantial rights is diminished. Thus, non-English speaking plaintiffs must premise their language discrimination claim on the preservation of established rights, and not naked demands for bilingualism.

The relative success of litigation seeking bilingual services is determined by the nature of the rights involved. Voting, for example, has been traditionally viewed as a fundamental right, and any infringement on its exercise is subjected to exacting judicial scrutiny (193). Inequality in the criminal justice area is also scrupulously probed (194). Cases involving the unequal delivery of social services, such as welfare, have received less favorable treatment by the courts (195). The greatest gains for non-English speakers have been where the rights at issue are deemed of particular importance by the courts.

Voting

In 1959, the Supreme Court unanimously upheld the use of North Carolina's literacy test, reasoning that:

> [T]he ability to read and write...has some relation to standards designed to promote intelligent use of the ballot...Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate common issues, a State might conclude that only those who are literate should exercise the franchise.(196)

The language policy of the United States toward Puerto Rico has been to encourage the use of Spanish in the schools. Puerto Ricans are, of course, citizens by birth and free to exercise their right to travel and reside in the United States (197). To foster Spanish rather than English as the primary language of Puerto Ricans, but to bar their right to vote because of English illiteracy, posed a manifest injustice which section 4(e) of the Voting Rights Act of 1965 (198) was intended to correct.

Until recently, the right to bilingual election procedures derived only from section 4(e) (199). Jointly sponsored by New York State Senators Javits and Kennedy, section 4(e) was targeted to prohibit the use of New York's literacy test as applied to Puerto Ricans residing in that state (200).

Since registration and voting was conducted in English --a language incomprehensible to the intended beneficiaries of section 4(e)--eradicating the use of literacy tests was not enough. Beginning in 1973, a series of lawsuits were filed charging that English-only elections constituted a condition on the right to vote of Spanish monolingual Puerto Ricans violative of section 4(e). In each lawsuit, the court found a violation of the statute and ordered bilingual elections of one degree or another (201).

In the seminal case, *Puerto Rican Organization for Political Action v. Kusper*, ("PROPA") (202), the Seventh

Circuit, relying on section 4(e), upheld an injunction ordering Spanish translations of certain election materials. Citing the voting rights cases concerning illiterates (203), the court determined that "right to vote" means the right to an effective vote, and that a Spanish monolingual could not cast an effective vote when confronted with election materials he could not understand. *Torres v. Sachs* (204), *Arroyo v. Tucker* (205), *Ortiz v. New York State Board of Elections* (206), and *Marquez v. Falcey* (207) all achieved bilingual elections, and together with *PROPA* provided the legal underpinning for the bilingual election provisions contained in section 203 of Title II and section 301 of Title III of the 1975 Voting Rights Amendments (208).

Now, a jurisdiction is deemed in violation of the Act if the Attorney General determines that any voting or registration materials provided to voters are exclusively English; that five percent of the voting age population within any state or political subdivision are members of a single language minority (209); and the rate of illiteracy of the particular language minority exceeds the national average of voting-age citizens (210).

Governmental Services

For many of the same reasons that language minorities have sought bilingual education and bilingual voting, they have also attempted to secure bilingual services in welfare and unemployment programs.

One court, *Pabon v. Lavine*, reading *Lau* in *pari passu*, has ruled that a federally-funded agency administering an unemployment insurance program exclusively in English will violate Title VI and applicable regulations if the result is that substantial numbers of non-English speaking persons receive fewer benefits than their English speaking counterparts. The plaintiff, a non-English speaking Puerto Rican, lost his right to appeal an adverse decision of an unemployment insurance referee because he could not comprehend the 30-day appeal notice written in English. Comparing the HEW regulation cited in *Lau* to those applicable to the New York State Unemployment Insurance System, the court noted that the United States Department of Labor had identical regulations (211).

That the district court did not require more specific guidelines, such as those contained in the May 25, 1970 HEW memorandum, to apply the holding of *Lau* is crucial, since many federal departments have issued regulations identical to those of the Department of Labor and HEW, but not equivalent interpretive memoranda (212).

The impact of *Lau* has extended to the area of welfare rights as well. In *Sanchez v. Norton* (213), Hispanics claimed denial of equal access to Connecticut's welfare sys-

tem, and sought bilingual forms, notices and personnel. The Court ruled:

> Whether viewed in the context of an "invidious classification" under the Equal Protection Clause [citations omitted], or as viable causes of action under Title VI of the Civil Rights Act, see *Lau v. Nichols*, ____ U.S. ____ (1974), the plaintiffs' allegations are sufficient to survive pre-trial dismissal.(214)

Prior to *Lau*, lawsuits seeking bilingual government services rested their claims exclusively on constitutional grounds, and were uniformly unsuccessful. In *Carmona v. Sheffield* (215) and *Guerrero v. Carleson* (216), both California cases, the courts rejected the proposition that to provide national origin minority groups with notices they could not understand ran afoul of the Fourteenth Amendment. The notice principles of *Mullane v. Central Hanover Bank & Trust Co.* (217), coupled with the due process strictures found in *Goldberg v. Kelly* (218), had not been enough to convince either court that by providing incomprehensible notices which affect property interests, due process rights are jeopardized. By presuming that non-English speaking persons will be assisted by bilingual "volunteers," the courts reached a determination that English-only notices are reasonable and do not violate the due process clause (219).

Underlying the *Carmona* and *Guerrero* decisions is the fear that accommodating one group opens the floodgates to all language groups pressing their demands for services in their own language, wreaking administrative chaos. The *Carmona* court wrote:

> In essence, plaintiffs' contention would require the State of California and, presumably, all other States and the Federal Government to provide forms and to conduct its affairs and proceedings in whatever language is spoken and understood by any person or group affected thereby. The breadth and scope of such a contention is so staggering as virtually to constitute its own refutation. If adopted in as cosmopolitan a society as ours, enriched as it has been by the immigration of persons from many lands with their distinctive linguistic and cultural heritages, it would virtually cause the processes of government to grind to a halt. The conduct of official business, including the proceedings and enactments of Congress, the Courts and administration agencies, would become all but impossible. The application of Federal and State statutes, regu-

lations and proceedings would be called into serious question.(220)

Kuri v. Edelman (220) is the only post-*Lau* federal court ruling in the area of government services where the court refused to follow the logic of *Lau*. In affirming the lower court's refusal to order bilingual termination notices, the Seventh Circuit distinguished *Lau* on the grounds that the petitioners sought no specific remedy. Informal procedures were available to welfare recipients in Hispanic neighborhoods, the court observed, to allow plaintiffs to comply with the rules of the Illinois Department of Public Aid (222).

Criminal Justice

Predictably, a non-English speaking defendant enmeshed in an English-only criminal justice system raises constitutional issues which go beyond civil rights. The Sixth Amendment, which guarantees the right to confront adverse witnesses and the correlative right of cross-examination, becomes somewhat hollow when the accused does not understand and receives no translation of the testimony against him. Although the Supreme Court has not met this issue squarely, lower courts have determined that the failure to provide an interpreter to non-English speaking defendants goes beyond the strictures of the Sixth Amendment and raises issues of fundamental fairness protected by the Fourteenth Amendment's due process clause.

The leading federal case, *United States Ex Rel. Negron v. State of New York* (223), involving a habeas corpus proceeding of a convicted murderer who spoke only Spanish, declared that "[t]he least we can require is that a court, put on notice of a defendant's severe language difficulty, make unmistakenly clear to him that he has a right to have a competent translator assist him, at state expense if need be, throughout his trial.(224)"

The limits of a state's due process obligations to translate notices which, when disregarded, carry criminal sanctions were set in Massachusetts in *Commonwealth v. Olivo* (225), which involved an English-written housing notice. In-hand service of an official order by a constable, the Supreme Judicial Court found, was sufficient for due process purposes to put a reasonable person on notice that the document was important and, if not understood, should be translated. Inability to speak English, the court noted, is not the type of disability which renders a person incapable of understanding the need for further inquiry (226). That the agency sending the notice had knowledge of the recipients' English illiteracy did not alter the court's position. A bilingual notice was not required.

In rejecting defendants' equal protection argument,

the court defined the class not in terms of national origin, but language only, thereby avoiding the need to strictly scrutinize the procedure at stake (227). Pegging its decision on *Carmona* and *Guerrero*, the Massachusetts High Court found that exclusively English notices were rationally based and consistent with the mandate of the equal protection clause.

Employment

In the equal employment opportunity area, the Sixth Circuit in *Frontera v. Sindell* (228) held that administering a civil service examination only in English for the job of carpenter did not violate the equal protection rights of the Spanish speaking plaintiff (229). As in *Olivo*, the court bifurcated language discrimination from national origin, ruling that the plaintiff was treated differently because of the language he spoke. As a result, national origin was not present to trigger the more stringent equal protection analysis.

As in *Carmona*, the court raised the spectre of the city of Cleveland having to translate all of its examinations into a multitude of languages for each of its national origin residents, emphasized that "the national language of the United States is English," and affirmed the dismissal of the complaint.

It is worth noting that neither the district court nor the Court of Appeals devoted any in-depth analysis to whether the level of English required to rank sufficiently high on the examination is, in fact, the level of English required to perform as a competent carpenter (231).

CONCLUSION

School reform is often as much a political issue as an educational one. Alexis de Tocqueville noted that in this country, significant social questions are ultimately destined to be put before the courts. That observation is as accurate today as when written in 1835. The debate over bilingual-bicultural education is no exception.

The proliferation of lawsuits demanding bilingual-bicultural education as relief for a school district's discriminatory conduct toward linguistic minorities comes at a time when the scope of the court's authority to involve itself in educational matters is in a flux. Undoubtedly, unequal educational opportunity is required to be uprooted, but the principles governing the nature and extent of the remedy to be employed in the process are less clear. In bilingual-bicultural education, the issue of the remedy tends to overshadow and virtually subsume the issue of liability, and it is likely that the newly evolving rights of

linguistic minority students will be further defined in the context of defining the limits of the court's power to forge far-reaching orders.

Lau v. Nichols, although silent as to a specific remedy, brought bilingual-bicultural education from the schoolhouse to the courts. Despite the limiting words in *San Antonio School District v. Rodriguez*, the few courts presented with a proven *Lau* violation have opted for a remedy, whether by consent decree or otherwise, including bilingual education.

A court-ordered bilingual program often jars the educational system and does little to persuade those who must carry out the decree of the merits of the program. Antipathy of school personnel to bilingual education may intensify judicial involvement (232). Despite all of the drawbacks, the failure of school districts to meet the needs of language minority students cannot be countenanced, and the jurisdiction of the courts will continue to be envoked.

Added to the arsenal of those seeking court-mandated bilingual programs are HEW's "*Lau* remedies." Although there is cause for concern as to the likelihood of their enforcement by HEW, the "*Lau* remedies" may be valuable to private litigants in suggesting to courts appropriate relief.

When raised in the context of desegregation, it is essential that those advocating bilingual-bicultural education characterize the program as an integrative and not segregative approach. As the Tenth Circuit in *Keyes* underscored, bilingual education is no substitute for desegregation. In other instances, as in *Morgan v. Kerrigan*, courts have been persuaded that bilingual programs do not threaten desegregation, that each is necessary to secure equality in education.

Litigation has served, and will continue to serve, as a necessary strategy for educational reform. Without that leverage, traditionally powerless communities often have no effective retort when cries of budget constraints and collective bargaining agreements are raised by the educational hierarchy. Raising superior federal rights to an equal educational opportunity tends to blunt these defenses, and permits them to be scrutinized in a way which would be improbable if the forum were the school board rather than the court. *Lau* and its progeny, together with the earlier desegregation decisions mandating bilingual programs, are convincing evidence that litigation is essential to secure dutiful compliance with applicable federal and state law where school systems are intransigent and unresponsive to the call for educational reform. But litigation should not, and need not, be the only tactic employed. Not all school districts must be threatened with court action or brought before the bar before answering the educational needs of linguistic minority students.

Efforts to pass state legislation mandating bilingual

education and to build community pressure on school officials are alternative approaches which have succeeded. These other avenues to secure bilingual education should be explored, not simply because courts are not always the best forums, but because the governing legal principles, themselves, have inherent limitations. Even the most far-reaching decrees treat bilingual education programs as essentially compensatory education, an antidote to unlawful discrimination. For those who view bilingual education more expansively, and chafe at the notion of remediation, lawsuits may produce less than satisfactory results.

Nevertheless, school districts are often resistant to change when the innovation relates to minority groups. In these circumstances, courts may be the only agents of reform.

Acknowledgment

We are indebted to Roy Rodriguez, Sanford J. Rosen, and Edward Steinman, who critiqued and commented on earlier drafts of this paper. Their suggestions are deeply appreciated and, where appropriate, have been incorporated.

Footnotes

1. 414 U.S. 563 (1974).
2. 347 U.S. 483 (1954).
3. For a sociolinguistic analysis of language, *see* FISHMAN, LANGUAGE LOYALTY IN THE UNITED STATES (1966), particularly pp. 92-126 relating to mother tongue maintenance in the schools.
4. 262 U.S. 390 (1923).
5. 262 U.S. 404 (1923).
6. *Id.*
7. For cases raising similar issues, *see also* Farrington v. Tokushige, 11 F.2d 710 (9th Cir. 1926) *aff'd*, 273 U.S. 284 (1927); Mo Hock ke Loc Po v. Stainback, 74 F. Supp. 852 (D. Hawaii 1947) *rev'd on other grounds*, 336 U.S. 368 (1949).
8. Meyer v. Nebraska, *supra* at 397-398.
9. *Id.* at 402.
10. *Id.* *See* Wisconsin v. Yoder, 406 U.S. 205, 213-214, 239 (1972), where the Court affirmed the setting aside of the convictions of Amish parents for violating Wisconsin's compulsory attendance laws by refusing to send their children to public high schools. Finding that the parents' conduct was protected by the First Amendment right to free exercise of religion, the ruling did re-emphasize the broad-based power of the state to set minimum education standards and reasonably regulate public school education citing Pierce v. Society of Sisters, 268 U.S. 510 (1925). ("Parents may [not] replace state educational requirements with their own idiosyncratic views of what a child needs to be a productive and happy member of society.") *See* Farrington v. Tokushige, *supra*

at 713, where the Court in striking down legislation restricting the teaching of Japanese in private foreign language schools emphasized "[I]n that connection we must remember that we are not now concerned with the public school system ...."

11. 271 U.S. 500 (1925).

12. The Court rested its decision on the equal protection clause of the Philippine Bill of Rights, which extended the guarantees equivalent to the due process and equal protection clauses of the Fourteenth Amendment to the Philippine Islands. Serra v. Mortiga, 204 U.S. 470, 474 (1907). Substantially the same criteria that would be applied to a Fourteenth Amendment case was applied in Yu Cong Eng, *Id.* at 524.

13. *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

14. *E.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970).

15. 384 U.S. 672 (1966).

16. 42 U.S.C. § 1973 *et seq.*

17. *Id.* at 677. *But see* Camacho v. Doe, 7 N.Y.2d 762, 163 N.W. 2d 140 (1959); Camacho v. Rogers, 199 F. Supp. 155 (S.D.N.Y. 1961).

18. Lau v. Nichols, *supra.*

19. 42 U.S.C. § 2000d (1970).

20. Federal expenditures for education increased dramatically with the passage of the Vocational Education Act of 1963, 20 U.S.C. § 1241 *et seq* (1970) (enacted January 2, 1970), and the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 236-244. As the level of federal funding for education rose to $4.2 billion in 1968 and to $16.5 billion in 1972, the number of schools receiving assistance multiplied. *See* LEVITAN AND TAGGART, THE PROMISE OF GREATNESS (1976), p. 121.

21. 42 U.S.C. § 2000d (1970).

22. The legal theory justifying the right of affected private parties to sue is that they are third-party beneficiaries of the contractual assurances against discrimination given by school districts as a condition for receiving federal funds. Bossier Parish School v. Lemon, 370 F.2d 847 (5th Cir. 1967) *cert. denied*, 388 U.S. 911 (1967); Natonabah v. Board of Education of Gallup-McKinley County School District, 355 F. Supp. 716 (D.N.M. 1973). *See also* Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969); Cook v. Ochsner Foundation Hospital, 319 F. Supp. 603 (E.D. La. 1970). *But see* Cannon v. University of Chicago, 406 F. Supp. 1257, 1259 (N.D. Ill. 1976) *aff'd*, 45 U.S.L.W. 2149 (7th Cir. August 27, 1976), holding that victims of sex discrimination

have no third-party beneficiary rights under Title IX, and that since *Lau* did not squarely address the issue as to Title VI, it would not be followed.

23. HEW regulation 45 C.F.R. § 80.3(b)(1) (1976) specifies that recipients of federal funds may not: "(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided to others under the program....(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program." Additionally, 45 C.F.R. § 80.3(b)(2) (1976) outlaws the use of methods or criteria which have the effect of discriminating against individuals on the basis of race or national origin. The guidelines state that "school systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system [33 Fed. Reg. 4956 (1968)]."

24. Relying on Brown v. Board of Education, *supra*, and its predecessors, Sweatt v. Painter, 339 U.S. 629 (1950), and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

25. Cal. Ed. Code § 12101 (1971).

26. *Id.* § 71.

27. *Id.* § 8573.

28. Graham v. Richardson, 403 U.S. 365, 372 (1971); Oyama v. California, 332 U.S. 633, 643-644 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

29. 483 F.2d 791, 793 (9th Cir. 1973), *rehearsing en banc denied* 483 F.2d 805, quoting from unreported district court opinion, Civil No. C-70, 627 LHB (N.D. Cal. May 26, 1970).

30. *Id.* at 798.

31. For an analysis of the constitutional arguments proffered see, *Note, The Constitutional Right of Bilingual Children to an Equal Educational Opportunity*, 47 S. CAL. L. REV. 943 (1974).

32. The Ninth Circuit dismissed the Title VI claim in a footnote, assuming that it was coterminous with the Equal Protection Clause: "Our determination of the merits of the other claims of appellants will likewise dispose of the claims made under the Civil Rights Act [Lau v. Nichols, 483 F.2d at 794]."

33. *See* 414 U.S. at 571 where this concept is reflected.

34. The rule of avoiding constitutional determinations was first enunciated by Justice Brandeis in his concurrence in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936).

35. 414 U.S. at 569.

36. *Id.* at 566.

37. *Id.* at 568.

38. This memorandum reflects HEW's findings that when English is the language of instruction, but no special assistance is provided to non-English speaking students, the local school district, upon these facts alone, has impermissibly excluded these students from participation in the district's educational program, denied them the benefits of that program and subjected them to discrimination under that program, all on account of their national origin. The clarifying guidelines state in part: "Where inability to speak and understand the English language excludes national-origin minority-group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

39. "The critical question is, therefore, whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601 Title VI. Last term, in Mourning v. Family Publications Services, Inc., 411 U.S. 356, 369 [other citations omitted], we held that the validity of a regulation promulgated under a general authorization provision such as § 602 of Title VI 'will be sustained so long as it is "reasonably related to the purposes of the enabling legislation' Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-281 (1969) [footnotes and other citations omitted]." 'I think the guidelines here fairly meet that test [414 U.S. at 571 (Stewart, J. concurring)]." The significance of Title VI and its effect-oriented proscription may be dramatically increased in the wake of Washington v. Davis, 426 U.S. 429 (1976), which held, in an employment discrimination case brought under 42 U.S.C. § 1973, that discriminatory effect without discriminatory intent is not sufficient to constitute a violation of the Equal Protection Clause. *Cf.* Village of Arlington Heights v. Metropolitan Housing Development Corp., 97 S.Ct. 455 (1977).

40. 414 U.S. at 564-565. It is wholly consistent with Supreme Court doctrine that no specific remedy was ordered in *Lau*. Remedies are almost always left to the trial court. *See* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 (1971); Brown v. Board of Education, 349 U.S. 294, 298, 300 (1955) (Brown II).

41. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Wood v. Strickland, 420 U.S. 308 (1974).

42. Wisconsin v. Yoder, *supra* at 213-214 (1972). *See* Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 596-599 (1968); *Accord*, Swann, 402 U.S. 1 at 16.

43. Meyer v. Nebraska, *supra*.

44. Yoder, 406 U.S. at 239.

45. *Id.*; Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

46. 411 U.S. 1.

47. Swann, 402 U.S. 1.

48. *See* Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (N.D. Mex. 1972) *aff'd*, 499 F.2d 1147 (10th Cir. 1974).

49. Green v. School Board of New Kent County, 391 U.S. 430, 439 (1968).

50. 35 Fed. Reg. 11595 (1970).

51. 20 U.S.C. § 1703 (Supp. V 1975).

52. 20 U.S.C. § 1703(d) (Supp. 1975).

53. The terms of these state laws differ, but the first, the Massachusetts Transitional Bilingual Education Law of 1971 (*Mass. Gen. Laws*, ch. 71A), served as a prototype for laws in other states. A brief description of this and other statutes appears in BILINGUAL-BICULTURAL EDUCATION: A HANDBOOK FOR ATTORNEYS AND COMMUNITY WORKERS (1975), pp. 251-280. Substantial growth of bilingual education is, in large measure, a consequence of the proliferation of state legislation. When bilingual education lawsuits are brought in states with bilingual education statutes, it is likely that courts will not go beyond the terms of the legislation in fashioning remedial decrees. *See* Milliken v. Bradley, 402 F. Supp. 1096, 1144 (E.D. Mich. 1975) *aff'd*, 540 F.2d 229 (6th Cir.), ____ U.S. ____, 45 U.S.L.W. 4873 (June 27, 1977). *But see* Morgan v. Kerrigan, 401 F. Supp. 216, 242 (D. Mass. 1975) *aff'd*, 530 F.2d 401 (1st Cir. 1976), *cert. denied sub nom.*; White v. Morgan, 426 U.S. 935 (1976), ____ U.S. ____, 44 U.S.L.W. 3719 (June 15, 1976), in which the district court in desegregating the Boston public schools required that bilingual education be offered to kindergarten students despite the fact that state law left bilingual education to the option of the school district.

54. 351 F. Supp. 1279 (N.D. Mex. 1972) *aff'd*, 499 F.2d 1147, 1154 (10th Cir. 1974).

55. 72 Civ. 4002 (S.D.N.Y. August 29, 1974) (unreported consent decree); 58 F.R.D. 62 (S.D.N.Y. 1973).

56. 73 F.R.D. 589 (E.D.N.Y. 1977).

57. 408 F. Supp. 162 (D. Col. 1975).

58. 77 C 1310 (E.D.N.Y. August 22, 1977) (Memorandum of Decision and Order).

59. Sirajini v. San Juan School District, Civil No. 75-346 (D.

Utah 1975); Denetclarence v. Board of Education of Independent School District No. 22, N. 8872 (D.N.M. February 15, 1974). The spread of bilingual education in reservation schools has resulted not so much from litigation related to bilingualism as from the efforts of the Indian nations, both in and out of court, to establish and strengthen their political sovereignty. The trend toward community-operated or tribally-operated schools and away from schools run by the Bureau of Indian Affairs, public school systems and the church, has sustained the growth of bilingual education programs on the reservations. *See* WABAUNSEE, ADDENDUM TO THIS PAPER.

60. 499 F.2d at 1154.

61. Beginning in 1963, the chief educational officers of the New York City schools had publicly endorsed bilingual-bicultural education. Superintendent Calvin E. Gross urged in 1963 that "Puerto Rican children and other new arrivals to the City be enabled to develop biculturally and bilingually," and he deplored "the melting pot approach in which new arrivals are made over in our own image (*New York Times*, May 2, 1963, p. 37, col. 1)." Two years later, the board of education stated: "Bilingualism and biculturalism will be encouraged for all pupils, and particularly Spanish-speaking ones, as an aspect of excellence which will benefit our community and nation in their relationship to a multicultured world (*Statement of Policy of Board of Education of New York City*, adopted April 18, 1965, issued April 28, 1965, p. 602)." And in 1967, New York City's endorsement of bilingual education was declared to Congress: "We are dedicated to the bilingual approach to this educational program. Although we stress the importance of full command of the English language, we also believe in the maintenance and strengthening of the child's language skills in the native tongue of the pupil or his parents. Bilingual programs can provide superior educational benefits (Testimony given by Dr. Bernard E. Donovan, Superintendent of Schools, New York City, before the House General Subcommittee on Education of the House Committee on Education and Labor on H.R. 9840 and H.R. 10224, July 7, 1967)."

62. 58 F.R.D. at 64.

63. 72 Civ. 4002 (S.D.N.Y. April 30, 1974) (unreported Memorandum and Order). *See* BILINGUAL-BICULTURAL EDUCATION, pp. 71-105 and 155-172 for the parties' plans.

64. The court rules that although the board is required to offer the program to all eligible students, a parent may withdraw a child at any time. *See* 72 Civ. 4002 (S.D.N.Y. July 11, 1975) (unreported Memorandum).

65. Professionals in the program must: (a) be fluent in the Spanish language and able to comprehend fully, and express

themselves effectively in, written Spanish; (b) possess the requisite content and knowledge skills in the substantive courses they teach; (c) possess the requisite pedagogical skills; and (d) be capable of reading, writing and speaking English.

66. The other defense to disclosing student records was the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § k232g, which, under certain circumstances, bars disclosure of the contents of student records.

67. Rios v. Read, *supra* at 595.

68. *Id.* at 16 referring to *H.R. Rep. No.* 93-805, 93rd Cong., 2nd sess. 66, reprinted in (1974) U.S. CODE CONG. AND ADMIN. NEWS 4148.

69. *Id.* at 596.

70. *Id.*

71. In addition, the court, citing Griggs v. Duke Power Co. [401 U.S. 424 (1971)], suggested that the plaintiff's burden of proof might be similar to the burden in an employment discrimination case brought under Title VII of the 1964 Civil Rights Act. That is, plaintiffs would first have to prove that the school district's programs and policies create a discriminatory situation in that they allow significant numbers of Hispanic students to lag behind English speaking students in academic progress because of problems with the English language. Once this was shown, school district officials would have the burden of demonstrating "that their bilingual program is genuinely designed and administered to meet the needs of English-language-deficient children and that alternative approaches would not produce results or would be unfeasible." *See* McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

72. 408 F. Supp. at 164.

73. This theory is premised on the hypothesis that the educational failure of minority children is attributable to a lack of compatibility between their characteristics and the characteristics presupposed by typical instructional programs tailored for a white, Anglo-Saxon, English speaking middle-class school population. Rather than changing the child to fit the instructional program, the theory proposes changing the instructional program to fit the child.

74. 521 F.2d 465 (10th Cir. 1975).

75. *Id.* at 482.

76. 408 F. Supp. at 170.

77. *Id.* at 171.

78. N.Y. Educ. L. § 2510 (2) (McKinney 1970).

79. Morris v. Brentwood, no. 75-8746 (Sup. Ct. August 14, 1975) *aff'd*, ____ App. Div. 2d ____ (2d Dep't. April 5, 1976) *leave to appeal denied*, ____ N.Y. 2d ____ (Ct. App. September 3, 1976).

80. Cintron v. Brentwood Union Free School District, *supra* at 17.

81. Formerly, in the context of school desegregation cases, courts relied heavily on analogous HEW standards in formulating relief. HEW's Office of Education first issued desegregation guidelines in April 1965. These guidelines "fixed the minimum standards to be used in determining the qualifications for schools applying for federal financial aid [Singleton v. Jackson Municipal Separate School District, 348 F.2d 729, 730 (5th Cir. 1965)]." School districts were given several choices of ways to satisfy Title VI requirements. The courts consistently attached great weight to these guidelines. In 1966 and again in 1968, HEW issued revised guidelines relating to school desegregation, and again courts accorded them "serious judicial deference, respectful consideration, and great weight," albeit refusing to abdicate their constitutional responsibilities to HEW entirely [United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1967) *cert. denied sub nom.*, United States v. Caddo Parish Board of Education, 389 U.S. 840 (1967)]. *See also* Kemp v. Beasley, 389 F.2d 178, 185 (8th Cir. 1968); Whittenberg v. Greenville County School District, 298 F. Supp. 784 (D.S.C. 1969).

82. Swann, 402 U.S. 1. (1971).

83. Brown, 394 U.S. 294, 297 (1955).

84. *Id.* at 300.

85. *See* note 42.

86. *See* notes 4, 7, 10 and 11.

87. *See* note 49.

88. *See* note 50.

89. *See also* Morales v. Shannon, 516 F.2d 411, 415 (5th Cir. 1975) where the Fifth Circuit opined: "[I]t strikes us that this entire question [of bilingual education] goes to a matter reserved to educators...," and cautioned that: "[O]n the off chance that defendants are engaging in discriminatory practices in the program as it currently exists, we pretermit decision here and remand to the district court for further consideration there on a fresh record in the event appellants determine to pursue the question. It is an unlawful educational practice to fail to take appropriate action to overcome language barriers. See § 204 (f) of the Equal Educational Opportunity Act of 1974 [20 U.S.C.A. § 1703(f)]. See also *Lau v. Nichols* [citation omitted]."

90. See the discussion of Serna v. Portales Municipal Schools.

91. Several of these issues are addressed by the U.S. Commission on Civil Rights Clearinghouse in A BETTER CHANCE TO LEARN: BILINGUAL BICULTURAL EDUCATION (1975); *see also* Grubb, *Breaking the Language Barrier: The Right to Bilingual Education.* 9 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 52, 53-57 (1974).

92. Within the first month of the Carter administration, the threat of cutoff of federal funds was resurrected by HEW Secretary Califano when he ordered the reopening of six school desegregation cases in Arkansas and Texas that the earlier administration "had left in limbo (*New York Times*, February 18, 1977, p. A16, col. 1)."

93. All of OCR's compliance reviews follow a similar scenario: regional offices select school districts for review; conduct on-site investigations; collect, review and analyze pertinent data; prepare findings; issue letters of noncompliance; seek voluntary corrective action; and, if all else fails, initiate administrative or judicial proceedings. This review process is predictably protracted.

94. 356 F. Supp. 92 (D.D.C. 1973) *aff'd in pertinent part*, 480 F.2d 1159 (D.C. Cir. 1973).

95. 391 F. Supp. 269 (D.D.C. 1975).

96. *Id.* at 271.

97. Civil Action No. 75-1068 (D.D.C. July 20, 1976) (preliminary injunction issued *sub nom.* Brown v. Matthews).

98. 45 C.F.R. § 80 (1976).

99. Aspira, 65 F.R.D. 541 (S.D.N.Y. 1975); 423 F. Supp. 647, 660 (S.D.N.Y. 1976). Congress authorized, as part of the Education Amendments of 1972, the award of attorneys' fees to prevailing parties in educational rights cases § 718 of Title VII (20 U.S.C. § 1617) (Supp. V 1975). In so doing, Congress intended to encourage private individuals to redress discrimination in schools through litigation.

100. Scheuer v. Rhodes, 416 U.S. 237, 238 (1974).

101. Wood v. Strickland, *supra*; *see also* O'Connor v. Donaldson, 422 U.S. 563 (1975).

102. Aspira, 423 F. Supp.

103. Griffin v. School Board of Prince Edward County, 377 U.S. 218, 233 (1964); United States v. School District 151 of Cook County, Illinois, 301 F. Supp. 201, 206 *aff'd*, 432 F.2d 1147 *cert. denied*, 402 U.S. 943 (1971).

104. 532 F.2d 380 (5th Cir. 1976) *rev'd on other grounds*, ____U.S. ____, 45 U.S.L.W. 3413 (December 7, 1976).

105. *Id.* at 397.

106. *Id.* at 398.

107. *Id. But see* Serna, 351 F. Supp. at 1283, where the court made implementation of the bilingual program a precondition for receipt of additional federal funds after HEW represented that such funds would be forthcoming.

108. *See* Rodriguez, 411 U.S. 1; Wheeler v. Barrera, 417 U.S. 402 (1974); New York State Association for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 764 (E.D.N.Y. 1973). *But see* Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972) *cert. denied sub nom.*; Dickey v. Robinson, 414 U.S. 976 (1973); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241 (1971).

109. 348 F. Supp. 866, 876 (D.D.C. 1972). *See* Jones v. Wittenberg, 330 F. Supp. 707, 713 (N.D. Ohio 1971) *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972), a prisoners' rights case in which the court ordered a reallocation of appropriations to meet the court's mandate to improve prison facilities. And, in Rhem v. Malcolm, 507 F.2d 333, 341 (2d Cir. 1974), claims of insufficient funds notwithstanding, the court required that unless inadequate prison facilities were remodeled, the prisoners were to be released. *See also* Finney v. Arkansas Board of Corrections, 505 F.2d 194, 200-204 (8th Cir. 1974); Rozecki v. Caughan, 459 F.2d 6 (1st Cir. 1972).

110. *See* Justice v. Board of Education, 351 F. Supp. 1252, 1261 (S.D.N.Y. 1972).

111. 42 U.S.C. § 2000d (1970).

112. Where state laws require that pupil/teacher ratios for bilingual classes be less than regular classes, there will be additional costs. *See, e.g.* the Massachusetts Transitional Bilingual Education Law, *supra* note 53. State laws mandating local educational agencies to offer bilingual education programs generally provide increased state aid on a *per capita* basis tied to the number of students in the programs. This may suggest that there are certain add-on costs to bilingual programs although the amount varies significantly from state to state. The cost benefits of bilingual programs to local school districts, however, are often hidden or overlooked. State education aid, for the most part, is based on a weighted average daily attendance formula.

113. 58 F.R.D. at 64.

114. Cintron, 77 C 1310 (E.D.N.Y. August 22, 1977) (Memorandum of Decision and Order).

115. Lee v. Macon, 483 F.2d 242, 243 (5th Cir. 1973); United States v. Greenwood Municipal Separate School District, 406 F.2d 1086, 1094 (5th Cir. 1969) *cert. denied*, 396 U.S. 1011

(1970); United States v. Board of Education of the City of Bessemer, 396 F.2d 44, 51 (5th Cir. 1968); Milliken v. Bradley, 402 F. Supp. 1096, 1144 (E.D. Mich. 1975) *aff'd*, 540 F.2d 229 (6th Cir.) ____U.S.____, 45 U.S.L.W. 4873 (June 27, 1977); Berry v. School District of City of Benton Harbor, ____F. Supp.____ (W.D. Mich. 1971) *rev'd as to other parts*, 505 F.2d 238, 240-241 (6th Cir. 1974).

116. Art. VI, § 2. In addition to the overriding force of federal law, it may be argued that a teacher unable to communicate with his students is incompetent. Most school districts pay at least lip service to competency as a factor in hiring and assigning faculty. Competency standards which govern school districts may be used to assure that personnel qualified to teach non-English speaking students will be hired and appropriately deployed. A teacher who cannot speak the language of his students may be transferred by the application of these competency standards and thereby avoid a conflict between teacher rights under contract and student rights under federal law.

117. 414 U.S. at 571-572.

118. 20 U.S.C. § 1703(f) (Supp. V 1975).

119. *Id.*

120. *See* Hernandez v. Porter, Civil Action No. 5-71532 (E.D. Mich. March 19, 1976).

121. 499 F.2d at 1149. Spanish surnamed pupils constituted 25 percent of the Portales school population, a "sizeable minority," most of whom were deficient in the English language. In affirming the trial court's order to implement bilingual programs, the Tenth Circuit sought to allay the concerns expressed by the New Mexico state board of education: "It is suggested that bilingual programs will not be necessitated throughout the state wherever a student is found who does not have adequate facility in the English language. We do not share [the state board of education's] fears. As Mr. Justice Blackmun pointed out in his concurring opinion in *Lau*, numbers are at the heart of this and only when a substantial group is being deprived of a meaningful education will a Title VI violation exist [*Id.* at 1154]."

122. In *Otero*, 1,063 students (only 8.2 percent) were Mexican American. The *Otero* court concluded that inability to speak or understand the English language excluded "no more than a tiny handful." Thus, the numbers of students with valid claims of *Lau* violations were "extremely small (408 F. Supp. at 165, 172)."

123. 70 F.R.D. 674, 677 (S.D.N.Y. 1976).

124. In Evans v. Buchanan, 416 F. Supp. 328, 360 (D. Del. 1976) (three-judge), a desegregation case involving Black plain-

tiffs and Hispanic intervenors, the court, citing *Lau*, prohibited the reduction of existing bilingual programs that served only 375 Hispanic students, less than one percent of the total pupil enrollment. In Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975) *aff'd*, 530 F.2d 401 (1st Cir. 1976) *cert. denied*, ____U.S.____, 44 U.S.L.W. 3719 (June 15, 1976), while Hispanic students found to need bilingual instruction numbered over 3,600, the plan adopted by the court also required bilingual programs for other less numerous linguistic minority students: 370 Italian, 519 Chinese, 160 Greek, 190 French Haitian and 60 Portuguese.

125. Letter from Peter E. Holmes, former Director, Office of Civil Rights, to Dr. J. Loren Troxel, Superintendent of the Seattle Public Schools, November 24, 1975. A school district found to be in noncompliance with *Lau* is required to submit a voluntary compliance plan only if the district has 20 or more students of the same language group having a primary or home language other than English. There is no magic in the figure 20, nor was it pulled from thin air. Rather, the "*Lau* remedies" undoubtedly followed the lead of the Massachusetts Transitional Bilingual Education Law. The Law requires school districts with 20 or more students of limited English speaking ability in one language classification to offer them bilingual education programs. The bilingual education laws of New Jersey, Illinois, Michigan and Texas also require a minimum of 20 students, but the latter three are more restrictive, since they require 20 or more such students in a school, not a school district.

126. Editorials, "Divisive Languages," *New York Times*, October 28, 1975, p. 32; "Bilingual Danger," *New York Times*, November 22, 1976; "Bilingual Issue, Cont'd," *New York Times*, December 11, 1976. *But see* Teitelbaum, H., "Bilingual Education Here," *New York Times*, May 25, 1975, p. 15, col. 4.

127. Cardenas, *Bilingual Education, Segregation, and a Third Alternative*, INEQUALITY IN EDUCATION 19 (1975), 19.

128. Judicial recognition of this concept is reflected in the desegregation plan adopted by the court in Boston, where a city-wide bilingual (Spanish-English) magnet school was exempted from the ethnic/racial student assignment guidelines (Morgan v. Kerrigan, *supra*). The regulations governing bilingual programs funded under the Bilingual Education Act expressly caution against excessive participation of students who are not of limited English ability and require that priority for placement in the programs must be given to students with limited English ability [45 C.F.R. § 123.02(g)(2)(i) (1976)]. This provision does not free school authorities to isolate children of limited English speaking ability, for the following provision states: "In such courses or subjects of study, as art, music, and physical

education, a program of bilingual education shall make provision for the participation of children of limited English speaking ability in regular classes [45 C.F.R. § 123.02(g)(2)(ii) (1976)]." And elsewhere, the regulations provide: "Nothing in this Part shall be construed to authorize isolation of children of limited English speaking ability by language or ethnic background unless the applicant demonstrates that separation for specific language learning activities for a portion of the school day is essential to the achievement of the purposes of this Part [45 C.F.R. § 123.13(b)(1976)]."

129. United States v. State of Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), *supplemented by* 330 F. Supp. 235 (E.D. Tex. 1971); Serna, 351 F. Supp. 1279 (N.D. Mex. 1972) *aff'd*, 499 F.2d 1147 (10th Cir. 1974).

130. This is not to suggest that courts obliged to dismantle *de jure* segregated school systems will except those in need of bilingual education from the desegregation mandate, or accept bilingual education as a substitute for desegregation. *See* Keyes v. School District No. 1, Denver, 521 F.2d 465 (10th Cir. 1975).

131. The 1968 regulations provide, in part, that a recipient of federal funds may not on the grounds of race, color, or national origin "Subject an individual to segregation or separate treatment [45 C.F.R. § 80.3(b)(iii) (1976)]" or discriminate "in the availability or use of any academic... or other facility...of the recipient [*Id.*, § 80.5(b)]." The May 25, 1970 memorandum directs that: "any ability grouping or tracking system employed by the school system to deal with the special language needs of national-origin minority-group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead-end or permanent track."

132. "It is not educationally necessary nor legally permissible to create racially/ethnically identifiable schools in order to respond to student language characteristics as specified in the programs described herein [*Lau* remedies, Part VI (A)]."

133. *Id.* at Part VI (B).

134. ESAA provides federal financial assistance to local education agencies which, voluntarily or under mandate, seek to eliminate minority group segregation and discrimination of students and faculty in elementary and secondary schools, and to overcome the educational disadvantages of minority group isolation [20 U.S.C. § 1601, *et seq* (Supp. 1975)]. Or, as expressed by one court, the Act provides federal funds "for educational agencies engaged in substantial programs to ameliorate racial isolation and its effects [Board of Education, Cincinnati v. Department of HEW, 396 F. Supp. 203, 233

(S.D. Ohio 1975)]." Special grants available under ESAA include those for bilingual projects intended to aid minority group children denied an equal educational opportunity because of "language barriers and cultural differences." These bilingual projects are to be designed to "...meet the special educational needs of minority group children who are from environments in which a dominant language is other than English, for the development of reading, writing, and speaking skills, in the English language and in the language of their parents or grandparents, and to meet the educational needs of such children and their classmates to understand the history and cultural background of the minority groups of which such children are members [20 U.S.C. § 1607(c)(1)(A) (Supp. V 1975)]." *See also* 20 U.S.C. § 1606(a)(6) (Supp. V 1975).

135. 20 U.S.C. § 1605(d)(1)(C) (Supp. V 1975).

136. 45 C.F.R. § 185.43(c) (1976).

137. *Id.*; 20 U.S.C. § 1605(d)(1)(C) (Supp. V 1975). To qualify as a *bona fide* ability grouping four requirements must be met: (1) placement in the group must be based on educationally relevant, nondiscriminatory, objective standards of measurement; (2) the grouping can be maintained during the school day for only as long as is necessary; (3) it must be designed to meet the student's special needs and to improve academic achievement and performance through specially developed curriculum taught by specially trained instructional personnel; (4) the grouping must be shown through objective testing to be educationally beneficial.

138. 45 C.F.R. § 185.43(d)(5) (1976).

139. *Supra* note 134, at 238.

140. Berkelman v. San Francisco Unified School District, 501 F.2d 1264, 1267-1268 (9th Cir. 1974); Murray v. West Baton Rouge Parish School Board, 472 F.2d 438, 444 (5th Cir. 1973); George v. O'Kelly, 448 F.2d 148, 150 (5th Cir. 1971); Moore v. Tangipahoa Parish School Board, 304 F. Supp. 244, 249 (D. La. 1969) *app. dismissed*, 421 F.2d 1407 (5th Cir. 1969); Hobsen v. Hansen, 269 F. Supp. 401, 442-492 (D.D.C. 1967) *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); United States v. Norcome, 375 F. Supp. 270, 286, 287-288 (D.D.C. 1974); Larry P. v. Riles, 343 F. Supp. 1306, 1312 (N.D. Cal. 1972); Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E. Pa. 1971) (consent decree); Swann v. Charlotte-Mecklenburg Board of Education, *supra*; Miller v. School District No. 2, Clarendon, S.C., 256 F. Supp. 370, 375 (D.S.C. 1966).

141. Board of Education v. Department of HEW, *supra* note 134, at 238.

142. 508 F.2d 1017, 1020 (5th Cir. 1975).

143. 45 C.F.R. § 185.43(c)(1) (1976).

144. For cases involving misclassification of limited English speaking students, *see* Hernandez v. Porter, *supra*; Guadalupe Organization v. Tempe Elementary District No. 3, *supra*; Diana v. State Board of Education, C-7037 RFP (N.D. Cal. June 18, 1973) (stimpulation and order); Panitch v. State of Wisconsin, 371 F. Supp. 955 (E.D. Wisc. 1974). *See also The Legal Implications of Cultural Bias in the Intelligence Testing of Disadvantaged School Children*, 61, GEO. L. J., 1027, 1028-1030 (1972); Leary, *Children Who Are Tested in Another Language: Mentally Retarded?*, 162, NEW REP., 17 (May 10, 1970).

145. Significantly, the ESAA regulations bar funding under the Act to local education agencies for "...[d]enying equality of educational opportunity...on the basis of language or cultural background [45 C.F.R. § 185.43(d)(2) (1976)]."

146. *See* Orfield, *How To Make Desegregation Work: The Adaptation of Schools to Their Newly Integrated Student Bodies*, 39 LAW & CONTEMP. PROB. 336 (1975).

147. United States v. State of Texas, 342 F. Supp. 24, 28 (E.D. Tex. 1971) *aff'd per curiam*, 446 F.2d 578 (5th Cir. 1972).

148. Brown v. Board of Education, *supra* at 300-301.

149. Watson v. City of Memphis, 373 U.S. 526, 529 (1963).

150. Griffin v. County School Board, *supra* at 234.

151. Bradley v. School Board of Richmond, 392 U.S. 103, 105 (1965).

152. Alexander v. Holmes County Board of Education, 396 U.S. 19, 20 (1969).

153. 391 U.S. 430, 437-438 (1968).

154. 402 U.S. 1, 15 (1971); *see also* Wright v. Council of City of Emporia, 407 U.S. 451, 463 (1972).

155. United States v. Texas, 320 F. Supp. 235, 247-249 (E.D. Tex.) *modifying* 331 F. Supp. 1043 (E.D. Tex. 1970) *aff'd in part*, 447 F.2d 441, 448 (5th Cir. 1970) *cert. denied*, 404 U.S. 1206 (1972).

156. United States v. Texas, 342 F. Supp. 24, 28 (E.D. Tex. 1971) *aff'd per curiam*, 446 F.2d 518 (5th Cir. 1972).

157. *Id.*, 342 F. Supp. at 27-28. Forty years earlier, Chicano children had challenged the segregated schools of the San Felipe Del Rio School District, arguing that to separate them from "other White" students violated the Constitution. The courts upheld the segregated schooling on the grounds that separation was justified by a rational reason--English language deficiency [Salvatieria v. Independent School District, 335 S.W. 2d 790 (1930) *cert. denied*, 284 U.S. 580

(1931)]. *See* Delgado v. Bastrop, Civ. No. 388 (W.D. Tex. 1948); Mendez v. Westminster School District, 64 F. Supp. 544 (S.D. Cal. 1946) *aff'd*, 161 F.2d 774 (9th Cir. 1947); Gonzalez v. Sheely, 96 F. Supp. 1004 (D. Ariz. 1951); Hernandez v. Driscoll Consolidated Independent School District, 2 Rel. L. Rep. 329 (S.D. Tex. January 11, 1957); Chapa v. Odem Independent School District, Civil No. 66-c-72 (S.D. Tex. July 20, 1967).

158. Segregation in some southern schools was not only authorized by statute and ordinance, but by state constitution as well [Keyes v. School District No. 1, Denver, 413 U.S. 189, 230 (Powell, J., concurring)].

159. §§ 8003 and 8004 Cal. Ed. (repealed 1947).

160. Cisneros v. Corpus Christi Independent School District, 467 F.2d 142 (5th Cir. 1972) *affirming and modifying* 324 F. Supp. 599 (S.D. Tex. 1970), 330 F. Supp. 1377 (S.D. Tex. 1971) (*en banc*) *cert. denied*, 413 U.S. 920 (1973).

161. A Texas education survey made in 1925 observed: "On pedagogical grounds a very good argument can be made for segregation in the early grades. In the opinion of the survey staff, it is wise to segregate, if it is done on educational grounds, and results in distinct efforts to provide non-English speaking pupils with specially trained teachers and the necessary special training resources [quoted in Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 39 REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO 313, 367 (1970)]."

162. Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975).

163. Gonzalez v. Sheely, 96 F. Supp. 1004.

164. Mendez v. Westminster School District, 64 F. Supp. 544.

165. 413 U.S. 189 (1973).

166. *Id.* at 198-214. Prior to *Keyes*, the distinction drawn by many lower federal courts between *de jure* and *de facto* school segregation grew increasingly blurred, and in the Fifth Circuit Court of Appeals was rejected outright (United States v. Texas Education Agency, *supra*). *Keyes* removes much of this confusion by requiring, prior to a finding of unconstitutionality, a showing that the segregated schools resulted from purposeful or intentional acts of school officials, and was not adventitious. The fact that schools are segregated will not alone support a finding of unlawful segregation. If considerations of race or ethnicity have not guided the actions or inactions of school authorities, but schools are segregated nonetheless--*de facto* segregation--no constitutional violation has occurred. However, if intentional segregation is proven with respect to a significant part of the school system, segregation existing in

other parts of the system will be presumed, and unless rebutted by the local school authorities, will be conclusive. Without a constitutional infringement, courts may be powerless to alter existing racial imbalances in schools. Unless it can be demonstrated that the school segregation is a consequence of other types of discriminatory state action--the acts of other state or local agencies or officials--the court's hands are tied. Whether a remedy is constitutionally mandated in these latter circumstances is a question expressly not reached in *Keyes*. Milliken v. Bradley, *supra*, the Detroit desegregation case, where a metropolitan plan was rejected because suburban school districts were not shown to have committed purposeful segregation, suggests that where there is no intent to segregate, there is no constitutional violation. Washington v. Davis, *supra*, lends further support to this construction. *See* Austin Independent School District v. United States, *supra*. One court, relying on *Lau*, has held that under Title VI, a claim of illegal student segregation can be established without proof of segregative intent [Soria v. Oxnard School District Board of Trustees, 386 F. Supp. 539 (C.D. Cal. 1974)]. Whether the basis for finding illegal school segregation can be expanded through Title VI is highly dubious in light of subsequent cases, and another provision of the Civil Rights Act of 1964 [42 U.S.C. § 2000c-6 (Supp. V 1975)] which deals specifically with school segregation.

167. *Supra* note 165, at 195. No longer could school officials engaging in purposeful segregative policies escape a finding of unlawful segregation simply by classifying Hispanic students as "White" and claiming that a school predominantly Black and Hispanic was not segregated. Nor could officials desegregate Black schools by reassigning only Hispanic students to these schools. As the court noted in Arvizu v. Waco Independent School District: "All too often, the practical effect of the desegregation of tri-ethnic school systems has been that black students are mixed with Mexican-American students, thus denying to both groups the benefit of any meaningful desegregation [373 F. Supp. 1264, 1270 (W.D. Tex. 1973) *aff'd in part, rev'd as to other issues*, 495 F.2d 499 (5th Cir. 1974)]."

168. 413 U.S. at 197. In so ruling, the Supreme Court adopted the reasoning of the Fifth Circuit Court of Appeals, which had previously held Hispanic persons to be part of a separate identifiable ethnic group. United States v. Texas Education Agency, 467 F.2d 848 (5th Cir. 1972) (*en banc*); Cisneros, 467 F.2d 142.

169. In combining Blacks and Hispanos "for the purposes of defining a 'segregated' school," the High Court relied on evidence that "in the Southwest, Hispanos and Negroes have a

great many things in common...[suffering] identical discrimination in treatment [413 U.S. at 197-198]."

170. Hart v. Community School Board of Brooklyn, NYC School District No. 21, 383 F. Supp. 699, 733 (E.D.N.Y.) *aff'd*, 512 F.2d 37 (2d Cir. 1975); Morgan v. Hennigan, 379 F. Supp. 410, 415 (D. Mass. 1974) *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1975) *cert. denied*, 421 U.S. 963 (liability), and 401 F. Supp. 216 (remedy), where Puerto Ricans, Cubans, Dominicans and other non-Whites were collectively accorded separate legal status as "other minorities." *But see* Evans v. Buchanan, *supra*, the Delaware desegregation case, where the court stated that in the absence of proof demonstrating that Hispanic students suffered discriminatory treatment similar to Blacks, they would not be considered a "minority group" for purposes of the Fourteenth Amendment. Nevertheless, this same court relying on *Lau* and the Equal Educational Opportunity Act of 1974 prohibited the reduction of existing bilingual programs for Hispanic students.

171. The Denver school system is tri-ethnic with Chicano students comprising the larger portion of the Black-Hispano minority [Keyes v. School District No. 1, Denver, 380 F. Supp. *supra* at 674 (D. Col. 1974)]. The district court found that minority children were not only unlawfully segregated, but suffered from the usual by-products of segregation: Low average scholastic achievement, less experienced teachers, higher dropout rates and inferior physical plants. The court determined that any remedy to dismantle Denver's dual school system could not stop at merely reshuffling Black, White and Hispanic school-children. Compensatory programs would have to be established to eradicate the effects of a discriminatory education [Keyes v. School District No. 1, Denver, 313 F. Supp. 77, 84 (D. Col. 1970)].

172. Keyes, 521 F.2d at 481.

173. *Id.* at 482.

174. *Id.*

175. *Id.* at 480.

176. *Id.* at 483.

177. *Id.* at 480, 483.

178. *Id.* at 1154.

179. *Id.* at 1153.

180. *Id.* at 1154.

181. *But see* Morgan v. Kerrigan, 530 F.2d at 416: "A remedy may sometimes properly 'exceed the violation' in that it may do more than eradicate the constitutional wrong. To the extent that 'overbreadth' in the remedy is necessary to ensure that

the constitutional violation is corrected, it is not at all unusual. There are many instances in the law in which remedial law places greater restrictions on primary activity than did the substantive law that had been violated."

182. Specific recommendations contained in the addendum included: Eliminating special costs for such items as gym shoes; taking field trips to museums, libraries, department stores, tortilla factories and other minority-run enterprises; and engaging theater and ballet groups to reinforce cultural recognition. Admittedly, these aspects of the addendum are extreme examples, but the district court never clarified whether it was adopting them and others in its order, and the Tenth Circuit was clearly troubled by this portion of the order. The reference to providing "collateral services" in the lower court's appendix appears open-ended when viewed together with the services enumerated in the addendum to the Cardenas Plan which the court appeared to adopt in *toto* [Keyes, 380 F. Supp. 673, 697 (D. Col. 1974)].

183. 402 U.S. at 16.

184. 418 U.S. 717 (1974).

185. *Id.* at 763.

186. 427 U.S. 424, 434 (1976).

187. *Id.*

188. ____U.S.____, ____U.S.C.____, (June 27, 1977).

189. *Id.* An opinion by Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concurring in the Court's remand of the Austin desegregation case, Austin Independent School District v. United States, *supra*, indicated that, at least with regard to busing for desegregative purposes, the Fifth Circuit's remedial standard went too far. Because these same three justices raised the same argument in dissenting from the court's opinion in *Keyes*, their concurrence in the Austin case seemed not to raise a new development. Nor does the majority's one sentence opinion to remand the case in light of Washington v. Davis, *supra*, reflect a shift in the Supreme Court's view of the remedial standard to be applied in desegregation cases. Only the question of liability was reviewed and remanded in *Austin*.

190. 45 U.S.L.W. 4873 (June 27, 1977). The district court, in order "to remedy effects of past segregation, to assure a successful desegregation effort and to minimize the possibility of resegregation," directed the Detroit school board to institute widespread compensatory education programs including: Vocational education, remedial reading, in-service faculty training and a component to ensure unbiased testing, counseling and career guidance. These educational components went far beyond the mere fixing of ratios and involved pro-

grammatic considerations. The district court's plan also included a bilingual education component.

191. *Id.*

192. *Id.* The view that many Black children speak a variation of English rather than use English incorrectly (*see generally* WILLIAMS, LANGUAGE AND POVERTY [1970]) has led some to question whether Black American students have rights under *Lau*. *See* van Geel, *The Right To Be Taught Standard English: Exploring the Implications of* Lau v. Nichols *for Black Americans*, 25 SYRACUSE L. REV. 863 (1974); Lester, *Recognizing Black English*, INTERCULT. DEVLP. RES. ASS'N. NWSLTR (June 1976) p. 4. Although Blacks from other nations may fall within the protection of *Lau* as national origin groups, Black Americans are considered a racial group by the courts, and would not be entitled to coverage since *Lau* and the May 25, 1970 HEW memorandum upon which it relies, are cast in terms of national origin only.

193. Dunn v. Blumstein, 405 U.S. 330 (1972).

194. Griffin v. Illinois, 351 U.S. 12 (1956).

195. Dandridge v. Williams, 397 U.S. 471 (1970).

196. Lassiter v. Northampton Board of Elections, 360 U.S. 45, 51-52 (1959). Justice Douglas, writing for the Court, underscored that the issue of the discriminatory use of literacy tests was not before the Court.

197. 48 U.S.C. § 733 *et seq* (1917).

198. *Id.*

199. *Id.* The constitutionality of section 4(e) was upheld in Morgan v. Katzenbach, 384 U.S. 641 (1966).

200. *See* Rasmusen v. Baker, 7 Wyo. 117, 50 p. 819 (1897), involving the voting rights of Fins. It should be noted that literacy tests in several states were initially passed to exclude White immigrants from the vote. They were not simply anti-Black or anti-Hispanic legislation

201. Castro v. California, 85 Cal. Rptr. 20, 466 F.2d 244 (1970), presents a case in which the California Supreme Court found that the use of an English-language literacy requirement violated the equal protection clause, but explicitly maintained in dictum that the State was not required to offer bilingual materials.

202. 490 F.2d 575 (7th Cir. 1973).

203. Garza v. Smith, 320 F. Supp. 131 (W.D. Tex. 1970) *vacated and remanded for appeal to 5th Cir.*, 401 U.S. 1006 *appeal dismissed for lack of jurisdiction*, 450 F.2d 790 (5th Cir. 1971); United States v. Post, 297 F. Supp. 46 (W.D. La.

1969); United States v. Louisiana, 265 F. Supp. 703 (E.D. La. 1966) *aff'd without opinion*, 386 U.S. 270 (1967).

204. 381 F. Supp. 309 (S.D.N.Y. 1974).

205. 372 F. Supp. 764 (E.D. Pa. 1974).

206. Civ. No. 74-455 (W.D.N.Y. 1975) (summary judgment granted).

207. Civ. No. 1447-73 (D.N.J. 1973) (preliminary injunction granted).

208. Section 203, Title II and section 301, Title III of P.L. 94.73 U.S. CODE CONG. AND ADMIN. NEWS, August 25, 1975 at 1483-1484. Implementing regulations appear at 41 FED. REG. 2997 (July 20, 1976).

209. For purposes of the Act, the term "language minority" is limited to Asian Americans, American Indians, Alaskan natives and persons of Spanish heritage whose native language is other than English.

210. Chinese for Affirmative Action v. Tequennec, No. C-75-2211-LHB (N.D. Col. October 21, 1975), represents the first lawsuit brought under the bilingual provisions of the 1975 Amendments.

211. 29 C.F.R. § 31.3 (b)(2), (a)(i) and (ii), a(I) and (IV) (1975).

212. The May 25, 1970 HEW memorandum permits plaintiffs in bilingual education litigation to by-pass the necessity of proving a disparity of benefits. Educational agencies are under an affirmative duty since unequal benefits are presumed.

213. Civil Action No. 15732 (D. Conn. June 3, 1974).

214. *Id.* The same reasoning as applied in *Sanchez* was applied in denying a motion to dismiss the complaint in Mendoza v. Lavine, 412 F. Supp. 1105 (S.D.N.Y. 1976) and Perdomo v. Trainor, 74 C. 2972 J.F. (N.D. Ill. 1975), cases virtually identical to *Sanchez*.

215. 325 F. Supp. 1341 (N.D. Cal. 1971) *aff'd*, 475 F.2d 738 (9th Cir. 1973).

216. 512 P.2d 833 (Cal. 1973) *cert. denied sub nom.*; Guerrero v. Swoap, 414 U.S. 1137 (1974).

217. 339 U.S. 306 (1950).

218. 397 U.S. 254 (1970).

219. Guerrero v. Carleson, *supra* at 837.

220. Carmona v. Sheffield, *supra* at 1342. The *Carmona* court assumed in its opinion that the non-English speakers before the court were aliens, and stressed that an elementary understanding of the English language is a condition to naturalization. Inasmuch as entitlement to welfare benefits

cannot be conditioned on citizenship (Graham v. Richardson, 403 U.S. 365 [1971]), the implication that all welfare applicants and recipients should be expected to possess English language skills is misleading. The court's reasoning also overlooks entirely the fact that there are over 50,000 Puerto Ricans in California.

221. 491 F.2d 684 (7th Cir. 1974).

222. *Kuri* is distinguishable. The plaintiffs sought preliminary injunctive relief and consequently were required to show that irreparable injury would flow from English-only notices. The court's finding that assistance was available to help recipients overcome the English language barrier undercut the claim of irreparable harm. The subsequent ruling in Perdomo v. Trainor, *supra* note 214, suggests that the *Kuri* rationale can be restricted to its narrow facts.

223. 434 F.2d 386 (2d Cir. 1970).

224. *Id.* at 391. Several state courts have found authority in the Sixth Amendment right to counsel, as well as the right to confrontation of witnesses, in finding a right to an interpreter. In State v. Vasquez, 101 Utah 444, 121 P.2d 903 (1942), the court analogized the right of confrontation of a non-English speaking defendant to a defendant placed in a transparent compartment where he could see what took place but could hear nothing. *See Ex parte Muraviov*, 192 Cal. App. 2d 604, B. Cal. Reptr. 466 (1961); *Ex parte Cannes*, 173 P.2d 506 (Okla. Crim. 1967); Parra v. Page, 430 P.2d 834 (Okla. Crim. 1967). *But see* State of New Jersey v. Curet, A-1329-71 (N.J. App. Div. 1973) where the court found the defendant to understand and speak enough English to comprehend the proceedings. Legislation is now before Congress entitled the Bilingual Courts Act which provides that in both criminal and civil proceedings in federal court, a translator is to be afforded. *See* S. 565 and H.R. 8314, H.R. 2255, H.R. 2243 and H.R. 4096 of the 94th Congress, first session.

In a similar context *see*, Trias Hernandez v. I.N.S., 528 F.2d 366, 369 (9th Cir. 1975) and Orozco Rangel v. I.N.S., 528 F.2d 224 (9th Cir. 1976) (where due process claims relating to English illiteracy were unsuccessfully raised in deportation proceedings), and Gonzalez-Gomez v. I.N.S., 450 F.2d 103, 107 (9th Cir. 1971) (in which the court placed little probative value on an English written affidavit signed by a Spanish monolingual which the government attempted to use as an admission in a deportation proceeding).

225. ____Mass.____ (1975), 337 N.E. 2d 904.

226. *See* Covey v. Somers, 351 U.S. 141 (1956) involving a mentally incompetent person whose due process right to notice was violated.

227. Compare *Olivo* with the court's equating language discrimination with national origin discrimination in Hernandez v. Erlenbush, 368 F. Supp. 752 (D. Ore. 1973). In *Hernandez*, a tavern owner's policy of forbidding foreign languages to be spoken at the bar was found to be national origin discrimination and was successfully challenged as a violation of the equal protection clause.

228. 522 F.2d 1215 (6th Cir. 1975).

229. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq* was not pleaded and the court declined to express a view as to whether Title VII would have produced a different result. The guidelines promulgated under Title VII indicate that were the statutory claim raised, the court's approach may well have been different:

> Title VII is intended to eliminate covert as well as overt practices of discrimination, and the Commission will, therefore, examine with particular concern cases where persons within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations. Examples of cases of this character which have come to the attention of the Commission include: *The use of tests in the English language where the individual tested came from circumstances where English was not that person's first language or mother tongue, and where English language skill is not a requirement of the work to be performed* [emphasis added] (29 C.F.R. § 1606.1 (b).

230. Carmona v. Sheffield, *supra*.

231. *See* Griggs v. Duke Power Co., 401 U.S. 431 (1971). The principles of *Griggs* have been applied to cases not raising Title VII. *See e.g.*, Vulcan Society of New York City Fire Department v. Civil Service Commission, 360 F. Supp. 1265 (S.D.N.Y. 1973) *aff'd*, 490 F.2d 387 (2d Cir. 1973). For a general discussion of the linkage between language and employment *see* LANGUAGE FOR THE WORLD OF WORK, Project R-49-99, Department of Education, State of Wyoming, Salt Lake City, Utah (1976).

232. *But see generally* ALLPORT, THE NATURE OF PREJUDICE (1954), particularly ch. 29, who asserts that at a minimum, law establishes an ethical norm for individual conduct, including conduct in the area of race relations.

Addendum: A. John Wabaunsee

Native American Viewpoint

Teitelbaum and Hiller provide an excellent overview of the legal implications of bilingual education, especially on the relationship between bilingualism and desegregation. However, the paper only skims over the problems of Native Americans and bilingual education. Hopefully, these remarks can supplement their work and provide a full range of views on the legal problems of bilingualism.

The Native American Rights Fund (NARF) is the only national Indian law firm exclusively representing Native Americans in the unique area of what is called "Indian law." Begun in 1972 with a grant from the Harvard Center for Law and Education, and now operating under a grant from the Ford Foundation NARF's Indian Education Project, NARF has been involved in most of the major legal problems in Indian education in the past five years.

NATIVE AMERICAN COMMUNITIES

In 1969, a Special Subcommittee on Indian Education (1) described the education of Native Americans as a process of "coercive assimilation." Native Americans have traditionally, and with good reason, viewed the education system as the dominant society's attempt to de-Indianize and Angloize them. Programs educating Native Americans are changing, and hopefully the education system no longer can be charged with coercive assimilation. Bilingual-bicultural instruction is a part of that change.

Editor's Note: As Mr. Wabaunsee points out, there has been little litigation over issues of Native Americans and bilingual education. Due to that fact, we have abridged his article to highlight major actions and to supplement Teitelbaum and Hiller.

On Indian reservations today, there is a rebirth of tribal nationalism and sovereignty (2). Indian tribes derive their sovereignty (their right to self-government) from their existence as Indian tribes and not from any grant or delegation of power from the state or federal powers. Justice Marshall defined Indian tribes as "distinct political communities, having territorial boundaries within which their authority is exclusive. (3)" Since 1962, tribes have won 25 significant victories in the Supreme Court (4) and seen six major congressional acts (5) passed--all of which have enhanced and strengthened tribal sovereignty.

The move toward bilingualism is closely related to changes in political consciousness. For Indian people, tribal sovereignty and political consciousness go hand in hand. As tribes have established and strengthened their sovereignty, the use of Indian languages in school systems has become a major political issue in Indian communities. The re-emergence of tribal sovereignty means that the political atmosphere on reservations would not tolerate school systems that relegated Native American language and culture secondary roles.

The rise of bilingual schooling on Indian reservations is a by-product of one major political event--the rise of Indian-controlled schools and schooling policies. It is not a consequence of litigation directly related to bilingual education. In this one area, Indian language maintenance is different from all other bilingual efforts in this country.

THE PRECEDENT FOR LOCAL CONTROL

The Rough Rock Demonstration School on the Navajo Reservation has shown Indian communities how they can control their own education system and what can be done with Indian control. Although Rough Rock was an extraordinary experiment funded by massive grants from BIA, OEO and private foundations, it was the first school system in modern times to be operated by an Indian community (6). The key part of Rough Rock's curriculum was a complete bilingual program which integrated the Navajo community and culture into the school. After visiting Rough Rock, Indians from other reservations began to try and translate the Rough Rock experience to their own reservations, since the only way to succeed was to control their own systems.

Two recent law review articles have clarified the legal basis for local control. In his article, "Indian Schools and Community Control,(7)" Daniel Rosenfeldt traces the history of Indian education and claims that the innovations in community control may be the solution to the Indian education problem. Michael Paul Gross in "Indian Control for Quality Indian Education,(8)" argued that prior to the

decision in *Lau v. Nichols*, inadequate education of Indians in Anglo-controlled public schools constituted a denial of equal protection. He concluded that Indians have the constitutional right to control their own schools. As vindicating this right, Gross pointed to a decision by the Wyoming State Committee for School District Organization which allowed the creation of a reservation-wide high school district at Wind River. Unfortunately, the Wyoming Supreme Court reversed the State Committee's decision, and the U.S. Supreme Court refused to grant a writ of certiorari (9). Nevertheless, by using existing statutory schemes and recently acquired Anglo political skills, Indians have been able to take control of the education systems or particular programs in many locales.

HOW LOCAL CONTROL IS INSTITUTED

The most common method of obtaining Indian control of a school district is to recruit enough Indian voters to constitute a majority who can use their voting power to elect an Indian-controlled school board. In those districts where Indians are a minority and the reservation is a separate area within the district, a separate Indian district can be created. This process of splitting away Indian districts has been successful in Montana, North Dakota, Minnesota and Michigan. Because the Supreme Court has recognized Indians as both a political and a racial group, the segregating of Native American students into all-Indian school districts has not been challenged under any of the Civil Rights Acts (10).

A very successful method for Indians to gain control over their schools has been the process of contracting. An Indian community or tribe offers to contract with BIA to educate their children with the money BIA would otherwise use to do so. BIA turns over any local school facilities to the contractor--the community--which can establish its own programs, including bilingual ones (11). This process has been so successful that Congress, in the Indian Self-Determination and Education Assistance Act (12), made the process of contracting educational services mandatory for BIA (13). In the declaration of policy, Congress said:

> The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of education as well as other federal services to Indian communities...(14).

As Indian tribes and communities develop the ability to administer contracts, more and more reservation schools will

be operated this way--including church-operated schools. When some of the church-operated schools faced closure for lack of finances, Indian communities approached BIA and the Office of Indian Education (DHEW) for funds to operate the schools under contract or with a grant (15). Although the lack of funds has limited the effectiveness of this option, in some communities it has provided a mechanism for community-controlled schools.

SUPPLEMENTALLY-BASED FUNDING

It is apparent that many schools are making provisions to become community or tribally-controlled operations. However, there are numerous public schools where Indian control will not be possible, or re-districting will not be feasible. In those schools, almost without exception, the children receive benefits from the Johnson O'Malley program (16) or the Indian Education Act of 1972. Both of these programs are, by law, supplemental and cannot be used for non-Indian students. Their regulations require parental consultation *and* approval before any contracts or grants will be given. The Johnson O'Malley regulations (17) probably give the most community control of any federal education program, and since both are, by law, responsive to the wishes of the Indian community, many districts have been forced to operate bilingual programs for Indian students.

As Teitelbaum and Hiller point out, budgetary limitations may be a hindrance to implementing full bilingual programs. If the bilingual program can be funded from supplemental funds, it may ensure a bilingual program without having to resort to litigation. The cost, however, may cause other supplemental programs such as Indian history and culture classes, which Indian students may need, to be forfeited. It is hard to fault Indian communities who choose not to use those supplemental funds for necessary bilingual programs.

CONCLUSION

What I have attempted to discuss is how Indian communities have dealt with the problem of implementing bilingual programs by the process of community control. This may explain why there is so little litigation over issues of Native Americans and bilingualism. To the best of my knowledge, there have been only two cases which have raised issues of Native American bilingualism, and these were not exclusively bilingual cases (18). The bilingual battle has been waged within the larger context of the fight for Indian control.

Footnotes

1. *Indian Education: A National Tragedy--A National Challenge Senate Committee on Labor and Public Welfare*, Special Subcommittee on Indian Education, S. Rep. No. 501, 91st Congress, first session (1969). Hereinafter referred to as S. Rep.

2. The discussion of bilingualism in schools educating Indians is limited to reservation schools or those schools taking children directly from the reservation, since almost no Native Americans in urban areas grow up with an Indian language as their primary language. It should also be remembered that non-English speaking children usually come from Indian communities where there is little Anglo contact (such as the Navajo and Eskimo) or where the traditional society is strong (such as Hopi and Pueblos). In addition, when I use the term "reservation," I do not mean to exclude Alaska and Oklahoma which, with certain minor exceptions, do not have reservation systems. I use the term reservation in its broadest meaning as being those rural areas of Indian population.

3. Worcester v. Georgia, 31 U.S. 515 (1830).

4. Bryan v. Itasca County, 48 L.Ed. 2d 710, ____U.S.____(1976); Cappaert v. United States, 48 L.Ed. 2d 523, ____U.S.____(1976); Northern Cheyenne Tribe v. Hollowbreast, 48 L.Ed. 2d 274, ____U.S.____(1976); Moe v. Confederated Salish and Kootenai Tribes, 48 L.Ed. 2d 96, ____U.S.____(1976); Fisher v. District Court, 96 S. Ct. 943 (1976); Antoine v. Washington, 420 U.S. 194 (1975); United States v. Mazurie, 419 U.S. 544 (1975); Morton v. Mancari, 417 U.S. 535 (1974); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Washington Game Department v. Puyallup Tribe, 414 U.S. 44 (1973); Satiacum v. Washington, 414 U.S. 1 (1973); Mattz v. Arnett, 412 U.S. 481 (1973); Tonasket v. Washington, 411 U.S. 451 (1973); McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Kennerly v. District

Court, 400 U.S. 423 (1971); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); Tooahnippah v. Hickel, 397 U.S. 598 (1970); Menominee Tribe v. United States, 391 U.S. 404 (1968); Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968); Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965); Arizona v. California, 373 U.S. 546 (1963); Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962); Seymour v. Superintendent, 368 U.S. 351 (1962).

5. The Tribal Jurisdictional Act, 28 U.S.C. § 1362; The Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1625; Indian Education Act of 1972, 20 U.S.C. § 241aa-241dd; Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq*; American Indian Policy Review Commission, 25 U.S.C. § 174; Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450a-450n and 25 U.S.C. §§ 452-456.

6. S. Rep. at 129.

7. 25 STAN. L. REV. 489 (1973).

8. 49 N. DAK. L. REV. 237.

9. Gerald v. Schrader, 531 P.2d 873 (Wyo. 1975) *cert. denied sub nom.*; Wind River Indian Education Association v. Gerard, 423 U.S. 904 (1976).

10. Morton v. Mancari, 417 U.S. 535 (1974).

11. One of the earliest and most successful contract schools is at Ramah, New Mexico. *See* Parmenter, *Community Control* 7 INEQUALITY IN EDUC. 10 (1971).

12. 25 U.S.C. § 450.

13. For a detailed explanation of contracting under the new law, *see* Dean, *Contracting Under Title I of the Indian Self-Determination and Education Assistance Act* 3 AM. INDIAN L. RPTR. r-7 (1976).

14. 25 U.S.C. § 450a.

15. Indian Education Act of 1972, 20 U.S.C. §§ 241aa-dd.

16. 25 U.S.C. §§ 452-456.

17. 25 C.F.R. Part 271.

18. Sinajini v. San Juan School District, Civil No. 75-346 (D. Utah 1975); Denetclarence v. Board of Education of Independent School District No. 22, N. 8872 (D.N.M. February 15, 1974). *See also* Teitelbaum and Hiller footnote 59.

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